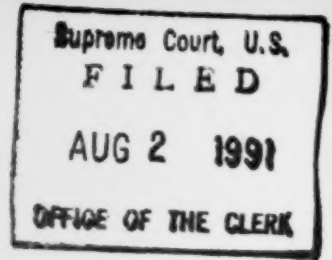


91-200
(1)



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN AND
MARTIN ROCHMAN

Petitioners

- v. -

THE STATE OF NEW HAMPSHIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DO COMMON STOCKHOLDERS OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE (PSNH) THAT HAS FILED FOR PROTECTION FROM CREDITORS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE HAVE STANDING TO CHALLENGE A DECISION ISSUED BY THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION APPROVING A RATE AGREEMENT EMBODIED IN A PLAN OF REORGANIZATION ON THE GROUNDS THAT SUCH DECISION VIOLATES RIGHTS OF PSNH AND ITS STOCKHOLDERS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

2. DOES A DECISION ISSUED BY THE NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION THAT APPROVES A RATE AGREEMENT EMBODIED IN A PLAN OF REORGANIZATION FOR PSNH WITHOUT REGARD TO WHETHER SUCH RATES WILL ENABLE PSNH TO RECOVER ITS PRUDENT INVESTMENT IN USED AND USEFUL PROPERTY CONSTITUTE A TAKING OF THE PROPERTY OF PSNH AND ITS STOCKHOLDERS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

PARTIES BELOW

Petitioners Richards, Kaufman and Rochman, common stockholders of Public Service Company of New Hampshire, were appellants below. The decision of the New Hampshire Public Utilities Commission was also appealed by the Campaign For Ratepayers Rights, an association representing some ratepayers, and by John V. Hilberg, an individual ratepayer. Responding to the appeals were the State of New Hampshire, Northeast Utilities Service Company on behalf of its parent, Northeast Utilities, and Public Service Company of New Hampshire. The Business & Industry Association of New Hampshire and the Office of Consumer Advocate filed a brief as amici curiae.

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OPINIONS BELOW

Petitioners, Robert C. Richards, Edward Kaufman and Martin Rochman (hereinafter referred to as "RKR") ask the Court to review a decision issued by the Supreme Court of New Hampshire on April 24, 1991, in Appeal of Robert C. Richards, Edward Kaufman and Martin Rochman; Appeal of Campaign for Ratepayers Rights and John V. Hilberg, _____ N.H. _____, _____ A.2d _____ (1991), dismissing RKR's appeal of Report and Order No. 19,918 issued by the New Hampshire Public Utilities Commission ("PUC") on July 20, 1990, in Re Northeast Utilities/ Public Service Company of New Hampshire, 114 PUR 4th 385 (N.H.P.U.C. 1990).

The opinion of the court below is at Appendix ("App.") A. The court's opinion on rehearing, dated June 5, 1991, is at App. B. Neither opinion is as yet offi-

cially reported.

The PUC's Report and Order No. 19,889, is at App. C. The PUC's Report and Order No.19,918 dated August 17, 1990, denying RKR's request for rehearing is at App. E. Its Report and Order No. 19,917, also of August 17, 1990, denying the request for rehearing of the Campaign for Ratepayers Rights ("CRR") and John V. Hilberg ("Hilberg") is at App.F.

JURISDICTION

This petition is being docketed within 90 days of the opinion on rehearing by the Supreme Court of New Hampshire on June 5, 1991. The Court has jurisdiction under 28 U.S.C. §1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V,
clause 3:

"[N]or shall private property be taken for public use, without just compensation."

United States Constitution, Amendment
XIV, clause 3:

"[N]or shall any state deprive any person of . . . property, without due process of law; nor deny to any person . . . equal protection of the laws."

N.H. Rev. Stat. Ann. 362-C

"1. Declaration of Purpose and Findings. The legislature finds that:

IV . . . the public utilities commission should be authorized to determine whether a proposed agreement relating to the reorganization of Public Service Company of New Hampshire and . . . the acquisition of Public Service Company of New Hampshire by Northeast Utilities, would be consistent with the public good and whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved."

"2. Definitions. In this chapter:

I. 'Agreement' means the agreement

dated as of November 22, 1989, as amended through December 14, 1989, executed by and between the governor and attorney general of the state of New Hampshire, on behalf of the state of New Hampshire, and Northeast Utilities Service Company, acting on behalf of its parent Northeast Utilities."

IV. 'NU plan' means the amended plan of reorganization filed in December of 1989, by Northeast Utilities Service company which provides for the resolution of the outstanding creditor claims and equity security interests of Public Service Company of New Hampshire in the Public Service Company of New Hampshire bankruptcy case."

"3. Action by the Commission. The Commission is authorized, after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the Commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates, fares, or charges and the fuel and purchased power adjustment clause to be maintained for Public Service Company of New Hampshire, or its successor, in accordance with the agreement; then the Commission shall initiate such other proceedings, hold such other hearings and take such other actions as may be necessary to implement the provisions of the agreement."

N.H. Rev. Stat. Ann. 378:27

Temporary Rates. In any proceeding involving the rates of a public utility brought either upon motion of the commission or upon complaint, the commission may, after reasonable notice and hearing, if it be of the opinion that the public interest so requires, immediately fix, determine and prescribe for the duration of said proceeding reasonable temporary rates; provided, however, that such temporary rates shall be sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation, as shown by the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports.

N. H. Rev. Stat. Ann. 378:28

Permanent Rates. So far as possible, the provision of RSA 378:27 shall be applied by the commission in fixing and determining permanent rates, as well as temporary rates. Nothing herein contained shall preclude the commission from receiving and considering any evidence which may be pertinent and material to the determination of a just and reasonable rate base and a just and reasonable rate of return thereon.

N. H. Rev Stat. Ann. 378:29

Adjustment. Temporary rates so fixed, determined, and prescribed under this subdivision shall be effective until the final determination of the rate

proceeding, unless terminated sooner by the commission. In every proceeding in which temporary rates are fixed, determined and prescribed under this subdivision, the commission shall consider the effect of such rates in fixing determining and prescribing rates to be thereafter demanded or received by such public utility on final determination of the rate proceeding. If, upon final disposition of the issues involved in such proceeding, the rates as finally determined are in excess of the rates prescribed in such temporary order, then such public utility shall be permitted to amortize and recover, by means of a temporary increase over and above the rates finally determined, such sum as shall represent the difference between the gross income obtained from the rates prescribed in such temporary order and the gross income which would have been obtained under the rates finally determined if applied during the period such temporary order was in effect.

STATEMENT OF THE CASE

On January 28, 1988, Public Service Company of New Hampshire ("PSNH") became the first electric utility since the Depression to file for protection from its creditors under Chapter 11 of the Bankruptcy Code and perhaps the first, ever, to be forced to do so by government regulation rather than economic forces.

Although the State of New Hampshire (the "State") permitted PSNH to finance the construction of its Seabrook Nuclear Generating Station ("Seabrook"), after PSNH had spent a substantial amount of money on the project, the State passed its "anti-CWIP law" (RSA 378:30-a) and prohibited PSNH from recovering a return of, or on, its construction work in progress. The anti-CWIP law increased greatly PSNH's cost of capital. It nevertheless was able to complete construction in 1986, but it could not get an operating

license from the Nuclear Regulatory Commission (the "NRC") because Massachusetts refused to cooperate in developing an emergency evacuation plan.

With PSNH clearly on the brink in 1987, the State then refused to grant relief from its anti-CWIP law and the Supreme Court of New Hampshire held that the law could be applied even under such circumstances. Petition of Public Service Company of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988). It held that the law merely allocated the risk of failure to the stockholders and was constitutional. It acknowledged at the same time that if the plant were finally successful, the stockholders would be entitled to a return that compensated them for the greater risk and the ratepayers would have to pay more as a consequence. 130 N.H. at 269, 539 A. 2d at 270. Two days later PSNH filed its Chapter 11 petition.

PSNH's subsequent appeal to this Court was dismissed for want of a properly presented federal question. Public Service Company of New Hampshire v. New Hampshire, 488 U.S. 1035 (1989).

It was expected that bankruptcy would merely defer, not discharge, PSNH's obligations to its creditors and would impose additional crushing costs on PSNH and its ratepayers. It did not turn out that way. The State has managed to exploit the processes of the bankruptcy court to avoid not only the expected consequences of its anti-CWIP law but the mandates of this Court with regard to just and reasonable rates.

The Plan and Rate Agreement

On April 20, 1990, the Bankruptcy Court for the District of New Hampshire confirmed (the "Confirmation Order") a plan of reorganization (the "Plan") proposed by Northeast Utilities ("NU") and

by PSNH, the Official Committee of Unsecured Creditors (the "Creditors Committee"), the Official Committee of Equity Security Holders (the "Equity Committee") and certain holders of PSNH's Third Mortgage Bonds.

The Plan is to be implemented in two steps. In the first, which occurred on May 16, 1991, shortly after the court below issued its decision herein, PSNH's outstanding debt and equity securities were exchanged for cash and new debt and common stock of "Reorganized PSNH". In the second, which will occur if the Confirmation Order becomes a final order and certain other approvals are obtained, a wholly owned subsidiary of NU will purchase, for \$20 a share, all of the newly issued common stock of Reorganized PSNH.

Embodied in, and at the heart of, the Plan is a rate agreement (the "Agreement") which purports to determine

the rates to be charged in the future by Reorganized PSNH. The Agreement was negotiated by NU on behalf of itself and the Governor and Attorney General on behalf of the State and signed on November 22, 1989. The Agreement was conditioned on its being embodied in the Plan and the first step of the Plan, as required by Section 1129 (a) (6) of the Bankruptcy Code, was conditioned on the Agreement being approved, to the satisfaction of NU, by the PUC.

The Agreement permits Reorganized PSNH to increase its average retail base rates by 5.5% a year for the next seven years. App. C at 153a. The first increase went into effect on January 1, 1990. The second, on May 16, 1991. The subsequent five increases will occur on the anniversaries of May 16, 1991. Thereafter, Reorganized PSNH's rates will be fixed at a level that will enable it

to recover its prudent costs as then reflected on its books.

The Agreement also provides that Reorganized PSNH will hold assets initially that have a book value of approximately \$2.3 billion consisting of \$800 million of non-Seabrook assets and approximately \$1.5 billion of PSNH's \$2.9 billion (as January 1, 1990) investment in Seabrook. Seabrook will be booked at \$700 million and depreciated on a straight line basis over Seabrook's expected life of 39 years. The remaining \$800 million of Seabrook will be booked as an "Acquisition Premium", \$425 million of which will be written off very quickly in 7 years and \$375 million, in 20 years. As a result of those extraordinary write-offs, NU expects that Reorganized PSNH's rates will be essentially flat or even decline a bit over the three years following the 7 year fixed rate period. At

the end of 10 years, NU expects that Reorganized PSNH's rates will be lower in real terms than they are today, only slightly higher than for the New England Region as a whole, and substantially less than those of United Illuminating, the second largest owner of Seabrook. App. C at 113a.²

²By contrast, the Long Island Lighting Company (LILCO), which faced identical licensing problems with its Shoreham Nuclear Generating Station ("Shoreham") but was allowed to stay out of bankruptcy by the New York Public Service Commission (the "NYPSC"), is charging rates now that are more than 30% higher than PSNH's and will raise its rates at about the rate of inflation for the next 8 years so that it can recover its investment in Shoreham. See LILCO's Annual Report for 1990 at 16 and 44.

Thus, PSNH's ratepayers will feel almost no real pain as a result of all the wrongheaded policies that have converged on Seabrook.

The investors, on the other hand, will suffer severe pain - especially the common stockholders.

PSNH's investment in Seabrook as of January 1, 1990 was \$2.9 billion. App. C at 92a. Because costs and interest continue to accrue, it was surely well over \$3 billion by July 1, 1990. Since Reorganized PSNH will place only \$1.5 billion of its investment in Seabrook on the books as of that date or later, and since the unsecured creditors and preferred stockholders will "give up" \$462 million (Memorandum Opinion on "RKR" Objections Re Confirmation of Plan of Reorganization 114 B.R. 820 (Bankr. D.N.H. 1990) (App.K at 574a.)), the common stockholders will lose at least \$1.038 billion.

The common stockholders will receive at most and only if the Plan is fully implemented \$163.5 million, (See Extracts from the Disclosure Statement, App. M at 658a) and thus at most 14 cents on every dollar they have invested in PSNH. However, since their actual distributions depend on the amount of unsecured claims finally allowed, they will receive less than the maximum, and probably closer to 10 cents on the dollar.

Moreover, if the merger does not occur so that PSNH ends up as a stand-alone company, the common stockholders, as well as the other impaired classes, will receive still less.

The Agreement contains an "Equity Collar" that provides that the seven 5.5% rate increases will be adjusted to keep the return on equity of Reorganized PSNH below 13.25% and above 10.5% on a cumulative basis over the seven year period.

If the merger occurs any downward adjustment will be based on \$2.3 billion. If, however, the merger does not occur and PSNH ends up as a stand-alone company, the adjustment will be based on an assumed investment of \$2 billion. The upward adjustment in either case will be based on an assumed investment of \$2 billion. App. C at 204a- 209a.

This Equity Collar reflects the fact that the negotiators for the State refused to allow Reorganized PSNH to charge rates that would enable it to recover more than \$2 billion. App. C at 276a. They wanted to wipe out the equity holders. They were, however, willing to permit NU to charge rates based on \$2.3 billion, if NU could prove to the PUC that the merger would generate at least \$300 million in savings for the ratepayers. NU proved that the merger would generate \$516 million of savings

(App.C at 294a) so it will have a chance at recovering its \$2.3 billion investment and a return thereon, that is modestly below its cost of capital. App. C at 203a.

Reorganized PSNH, as a stand-alone company, however, will have no chance. It will be limited to earning a return of 13.25% on the assumed equity portion of \$2 billion, not its entire equity. As a consequence, its common stock will earn a return far below its cost of capital and be worth substantially less than \$20 per share (App. C at 161a and 340a). If that happens, the impaired classes will have received substantially less than the Disclosure Statement estimated they would receive. App. M at 656a-658a.³

³ Recognizing, but not until January 1991, that the Disclosure Statement was false on this point, RKR asked the Bank-

Thus, even if it can be said that the State has obtained by its deal with NU just compensation for PSNH's property, the State nevertheless has violated the constitution. It in effect has taken PSNH's property for a private purpose - to benefit NU's stockholders and ratepayers as well as PSNH's ratepayers.

But the State clearly has not obtained just compensation for PSNH's property. Even if the Constitution requires only a balancing of ratepayer and investor interest, it surely can not be said that the above described disparity in pain is just.

ruptcy Court to revoke the Confirmation Order on the grounds of fraud. The Bankruptcy Court denied the request on the grounds that it was barred by the Code (11 U.S.C. § 1144) even though it had not yet gone into effect.

And if, as RKR contends, the Constitution requires that prudent investment be the measure of just compensation, the result is clearly and woefully deficient.

As stated in the Disclosure Statement, an audit done for the PUC concluded that 93% of PSNH's investment in Seabrook was prudent. Another done for the Connecticut Department of Public Utility Control, concluded that 75% was prudent. App. M at 670a. Audits done by PSNH and the joint owners claimed that 100% of the investment was prudent. These audits indicate that the State has in effect confiscated from \$750 million to \$1.5 billion of PSNH's property as of July 1, 1990, and more as of any later date.

No one has as yet offered these audits into evidence in any proceeding, but no one has as yet offered any other evidence on the subject either. It is conceivable that less than 50% of

Seabrook was prudent but no one has generated any information that would cause one to think so. NU and the State have been able to achieve this grossly unfair result without having to supply any evidence or analysis whatsoever that it was consistent with PSNH's right to recover its prudent investment. And they were able to do it because and only because the State first forced PSNH into bankruptcy with its anti-CWIP law.

Creation of the Plan

On March 16, 1989, the Bankruptcy Court denied PSNH's motion for an extension of the "exclusivity period". It then became possible for NU, among others, to get confirmed a plan of reorganization for PSNH over the objection of PSNH and without the acceptance of its common stockholders.

Also, on April 21, 1989, the Nuclear Regulatory Commission (the "NRC") issued

an operating license to the Long Island Lighting Company ("LILCO") for its Shoreham Nuclear Power Station ("Shoreham") which had experienced identical licensing problems. It was then apparent that the NRC would soon license Seabrook, and that PSNH would soon have the right under New Hampshire law to file for, and receive, a substantial rate increase. RSA 378:27, :28 and :29. Moreover, the law obliged the PUC to grant a substantial temporary within six months to cover prudent investment or a surcharge on the permanent increase to recoup the difference. The State then had a very strong interest in making a deal with somebody that would avoid that outcome.

NU and the State were natural allies and soon combined to try to take PSNH at the lowest possible price, regardless of the State's obligations under the Consti-

tution and the law and regardless of the impact on the investors in PSNH. See the Extracts from the Examiner's Second Report, App. O at 721a-722a.

The Equity Committee initially resisted and it was able to achieve more value for the equity holders than NU originally contemplated paying. But in the end the Equity Committee accepted the Plan and thus far less than what PSNH and its stockholders were entitled to. Why? The answer is clear. They negotiated until they got enough for themselves and the people they truly represented and then caved.

All members of the Equity Committee, except for Petitioner Rochman, are holders of preferred stock. App. M at 650a.⁴

⁴The record does not reveal the members' actual holdings because the Trustee referred RKR's request for such

Holders of preferred have an inherent conflict of interest with holders of common. Also, unpaid dividends on preferred earn no interest, and therefore the preferred have an interest in making a deal that satisfies them as quickly as possible rather than fighting for more. But here the conflict is even more severe.

The record indicates that the Equity

information to the Equity Committee and the Equity Committee ignored it. But at a meeting in the Trustee's office on February 28, 1990, to consider the applications of Richards, Kaufman and other common stockholders to be appointed to the Equity Committee, at which counsel for NU and the committee were present, the Trustee stated that all members of the committee held predominately preferred stock.

Committee is dominated by persons who hold PSNH's older relatively low dividend (3.35% to 9%) \$100 par value preferred stock. The Chairman of the committee, The Mutual Benefit Life Insurance Company, holds 9.18% of the \$100 par value preferred stock. And the Ex Officio member, the Prudential Life Insurance Company of America holds 14.64% of the \$100 par preferred. App. M at 684a.

Also, the fact that the Equity Committee chose to base the allocation of the distribution to the preferred on par value rather than on the total pre-petition claims suggests rather strongly that the committee is dominated by such holders. The preferred as a class will receive about 70% of their pre-petition claims but each holder will receive about 104% of par value. App. M at 656a. The holders of the low dividend preferred will receive more and in some cases sub-

stantially more than 70% of their prepetition claims.

Mr. Harry Saxon, a holder of the highest dividend \$25 par value preferred, appeared at the confirmation hearing to complain about the allocation. He argued that it should have been based on total claims rather than par value and claimed that it was based on par value because the committee was "packed" with holders of the \$100 par preferred.⁵

Counsel for the committee objected to Mr. Saxon's characterization but he did not refute the allegation. He then said that the allocation was based on par value in order to "get more down to the common." The Bankruptcy Court adopted

⁵ The transcript from the confirmation hearing dealing with Mr. Saxon's allegation and complaint is at Appendix N.

that explanation (see Extracts from the General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues, App.L at 648a), but it is obviously specious. Reallocating the distribution to the preferred can not get more down to the common. What it could do, however, and no doubt did do, was make the "give ups" by the preferred to the common more acceptable to the holders of the \$100 par preferred on the committee.

And the holders of such stock of course have a great interest in having the Plan confirmed. They will receive more from the Plan than they could expect to receive if PSNH recovered all of its investment in Seabrook and then honored all its obligations to its creditors and preferred stockholders. They would then receive their unpaid dividends but their stock would once again fall to a rather small percentage of par value.

It is not surprising, therefore, that the Equity Committee decided to accept the Plan rather than hold out for more for the \$25 par preferred and the common.

And once NU and the State had obtained the support of the Equity Committee, it was not difficult for them to persuade management of PSNH to climb on board.

Management had indicated, years ago, that it was a lot more concerned about the ratepayers and acceptance by the State of its stewardship than the welfare of the common stockholders.

In 1988, shortly after the filing in Chapter 11, management changed the accounting on Seabrook, effective for 1987, to eliminate the allowance for funds used during construction (AFDUC) and thereby wrote off, for financial statement purposes, about \$1 billion. App. K at 563a.

It justified the change by saying that "political and competitive pressures would not permit the Company to recover the recorded cost of its investment in accordance with traditional utility ratemaking practices." App. M at 679a.

The change in accounting did not preclude management from actually trying to recover most if not all of Seabrook in a rate case. It did not make the change on the regulatory books, the Form 1, used for ratemaking purposes. Nevertheless, it said, at the end of the disclosure statement process under pressure from the Bankruptcy Court (App. K at 568a, n.2), that it would not try to recover more of Seabrook than resulted from the accounting change (\$1.8 billion). After that statement, management was only a short step from supporting the Plan.

The State and NU apparently did not think PSNH's support was necessary. NU

had already completed preparation of the Disclosure Statement and the legislature had already passed RSA 362-C. But they apparently thought it was prudent to get management's support.

To secure it, NU agreed to retain all of PSNH's employees except for the top five officers and would give those five reasonably generous retirement benefits (App. M at 651a) (referred to by some parties to the proceedings before the Commission as "parachutes"). App. C at 135a. NU agreed as well to give the other 51 key employees significant job security. App. M at 653a.

Once management had accepted such terms, it was no longer a factor in the case. For all intents and purposes, NU and PSNH became one. And on April 30, 1990, pursuant to the Plan and Confirmation Order, PSNH's Board and top five officers resigned. A new board was

selected by the official committees, and NU, in anticipation that the Plan will be fully implemented, began to manage PSNH. If the merger agreement is terminated sometime in the future, NU will continue to manage PSNH for six months until new management can be put in place.

Acceptance by the Impaired Classes

NU also secured acceptance of the Plan by all the impaired classes except the warrant holders by the necessary majorities (67% of those voting).

To achieve it, NU drafted and distributed the Disclosure Statement which described the Plan and the likely consequences (according to NU) if the Plan is not confirmed. It stated, inter alia, that PSNH would then have to seek rate relief in the traditional manner, and that since PSNH did not have a right to recover its prudent investment in Seabrook because the PUC had "a great

deal of discretion" and "wide latitude" to establish rates that were "affordable", PSNH could not be certain of achieving more in a rate case than will be achieved by the Plan. App. M at 661a-678a.

The Examiner, Mr. Paul L. Gioia, a former chairman of the NYPSC, aided NU and the Bankruptcy Court in describing the rate case alternative. The description apparently reflects his understanding of the power of the PUC.

It is noted, however, that Mr. Gioia chaired the NYPSC when it held that LILCO could recover all of its prudent investment in Shoreham and that it would be "imprudent, unfair, and bad regulatory policy" to deny LILCO that right even if some of Shoreham's capacity proves to be excess for some period of time. Re Long Island Lighting Company, 75 P.U.R. 4th 423 at 457 (1986). Mr. Gioia apparently

believes that the PUC has the discretion to be unfair, as well as wrongheaded.

The Disclosure Statement also said that if the equity interests did not accept the Plan, NU would request that it be confirmed anyway. App. M at 659a. And as noted above, the Disclosure Statement did not disclose what the common would receive as a percentage of their total investment and misrepresented what the equity holders would receive (and did not disclose what the unsecured creditors would receive) if the merger were not consummated. And it also gave the distinct impression that there was no one involved in the case that was terribly interested in pursuing the rate case alternative.

Given such a Disclosure Statement, it is not surprising that the impaired classes (other than the warrant holders) accepted the Plan. But even so less than

40% of the common, and less than 40% of the \$25 par preferred, actually voted affirmatively to accept the Plan. App. O at 706a. New Hampshire law requires, under normal non-bankruptcy circumstances, that more than 50% of the common stockholders eligible to vote approve a sale of the company. RSA 293-A:74. The State thus managed to avoid another protection provided by New Hampshire law to investors in its utilities.

The Petitioners

RKR began to participate in the process in December of 1989 after the deal had been negotiated and the Disclosure Statement had nearly been finalized.

Mr. Rochman was appointed to the Equity Committee in November of 1989 and immediately announced his opposition to the Plan. He also asked the Trustee to appoint a separate committee to represent the common stockholders as it was clear

to him that the Equity Committee dominated as it was by preferred stockholders could not and had not properly represented the common. His request was denied.

Mr. Richards is a lawyer and worked 17 years for LILCO as a lawyer and corporate planner while LILCO experienced its difficulties with licensing, building and recovering its investment in Shoreham. App. K at 599a. He was introduced to Mr. Rochman in early December, 1989, by Mr. Donald Smith, a major holder of common stock in PSNH (App. M at 684a), and a member of the Equity Committee during the negotiations of the Plan. Mr. Smith told Mr. Richards that he opposed the Plan and resigned shortly after it had been negotiated. Mr. Rochman was apparently selected by the Trustee to replace Mr. Smith on the committee to give the common at least token representation.

Dr. Edward Kaufman is a major stock-

holder in PSNH and responded in January 1990 to the efforts of Rochman and Richards to solicit opposition to the Plan.

Together RKR held about 200,000 shares of common stock on May 16, 1990. The court below noted that that was less than 1% of the stock of PSNH but it is substantially more than held by the former management of PSNH (App. M at 684a) and as far as the record discloses substantially more than held in total by all the other persons actively involved in the case. Also, as RKR informed the Supreme Court of New Hampshire at oral argument, RKR has received financial support from more than 2000 other stockholders that held more than one million additional shares.

Confirmation of the Plan

After making some unavailing motions to change the Disclosure Statement to better reflect PSNH's rights, to create a

common stockholder committee that could effectively represent the common stockholders at the confirmation hearing (In re Public Serv. Co. of N.H., 116 Bankr. 347 (Bankr. D.N.H. 1990) and to summarily reject the Plan (In re Public Serv. Co. of N.H., 112 Bankr. 49 (Bankr. D.N.H. 1990), RKR submitted detailed objections to the Plan.

RKR contended therein that given the prudency audits and the absence of any other information on the subject, NU could not possibly prove, and the Bankruptcy Court could not possibly determine, that the result of the Agreement was within the range of outcomes of a Seabrook rate case.

RKR acknowledged that PSNH could probably not recover its prudent investment in the traditional manner, i.e. on a straight line basis over its useful life, but argued that PSNH could recover it or

at least much more than 50% of it in a non-traditional manner.

They pointed out that consultants to the industry had been saying for years that straight line depreciation of long lived utility investments was irrational and contrary to the public interest because it caused the "revenue requirement" (and therefore rates) to increase greatly when a large investment (even an economic one) first goes on line (the rate shock) and then to decline over the life of the investment, while the value of the services provided by any investment will probably increase with inflation. RKR argued that PSNH should change, and the PUC should permit it to change, to a depreciation method that would ameliorate the rate shock and then cause the revenue requirement to rise rather than fall over Seabrook's life. RKR supplied some analyses that indicated how that could be

done, and that if it were done, PSNH could recover much more than 50%, if not all, of Seabrook with rates that were as low and perhaps lower than the rates analyzed by Bower, Rohr & Associates, as described in the Disclosure Statement (see App. M at 673a) and thus with rates that would not impose an excessive burden on the economy.

RKR argued that although PSNH did not have a constitutional right to recover its prudent investment in the traditional manner, the State also could not insist that PSNH do so in order to justify denying recovery of prudent investment. RKR argued that the PUC must change from tradition if necessary to give PSNH a fair opportunity to recover its prudent investment.

RKR also pointed out that recovering most of Seabrook would be burdensome, mainly because PSNH would have to have a

substantial equity ratio to protect itself from regulatory risk and as a consequence would have to pay substantial taxes to the federal government. The rest of the nation would thus "profit" greatly from New Hampshire's distress. To avoid that, RKR suggested that the State cause its Energy Authority to buy PSNH's securities for a fair price - \$3.4 billion or so. Then the State could honor its legal and constitutional obligations to the investors and the Energy Authority could probably recover the purchase price and its other costs with rates that were no higher, and perhaps even lower, than set forth in the Agreement.

NU responded to RKR's objections by arguing that the PUC had "essentially unfettered discretion" to set just and reasonable rates and thus could deny the recovery of prudent investment if neces-

sary to set what it considered to be "affordable rates"; that PSNH could not expect to recover more than \$1.8 billion of Seabrook because management had already said that it would not try to recover more; that rates must be set in conformance with GAAP and therefore a change to some other depreciation or amortization method was not possible; and that if PSNH tried to recover its entire investment in the traditional manner, or even pursuant to a so called 10 year phase-in (that was permitted by GAAP), it would lose much of its loads to cogeneration and municipalization. It also said that the State no longer had any interest in buying PSNH. (To prove that, the State repealed the statute creating the Energy Authority during the confirmation process. App. K at 548a.) Or in other words, according to NU, if PSNH charged high rates, individual communi-

ties would be inspired to get off the system, forcing rates up to everyone else, but the State would not be inspired to negotiate a fair price for the whole system in order to reduce rates for all.

NU sponsored a parade of witnesses at the confirmation hearing to support their arguments. They said that PSNH could not expect to recover all of its investment in Seabrook in the traditional manner because the rates would have to be too high (which RKR had of course conceded). And they said that in their opinion the Agreement would produce a result within the range of what could be expected from a Seabrook rate case but none of them said that as little as 50% of Seabrook might be prudent and none of them articulated any other principle, other than "unfettered discretion" that would, if applied, limit recovery to as little 50%. Their claimed expertise was

not in prudent investment or in the application of the "used and useful principle, but rather in predicting what the PUC would do in a rate case, in response to testimony that had not yet been produced and how the courts, including this Court, would react. In other words, they claimed expertise in telling fortunes.

Richards cross examined NU's witnesses and testified himself to rebut NU's criticism's of RKR's objections. The court excluded much of what Richards offered on the grounds that it was not detailed enough because it did not describe what would happen in the next century and (10 minutes later) that it was too detailed because it would get the court involved in conducting a rate case. App. N at 715a- 719a.

Seven days after the close of the hearing, the Bankruptcy Court issued its confirmation order. A month later, on

May 17, 1990, it issued its opinion dealing with RKR's objections. The Bankruptcy Court essentially adopted all of NU's arguments. App. K at 613a to 633a. In particular it said that PSNH did not have the right to recover prudent investment but only prudent investment in used and useful plant and the PUC has the power to "evolve" the used and useful principle as necessary to effectuate a sharing of the prudent cost in excess capacity. It also said that even if PSNH could achieve more in a rate case, intervening interest would consume any additional value, thus subscribing to the notion advanced by NU that the State could, by mere vigor, cause delay and at stockholder expense, despite the fact that RSA 378:29 says that PSNH would be entitled to a temporary that covers prudent costs within 6 months or a surcharge on the permanent rates that recoups the difference.

RKR filed a timely appeal with the District Court of the District of New Hampshire claiming that the opinion was clearly erroneous because it was clearly contrary to PSNH's constitutional rights and irrational. NU showed that PSNH could not recover all of Seabrook in the traditional manner but that hardly implies that the Agreement was a fair compromise unless the PUC has unlimited discretion to set just and reasonable rates. RKR also asked the Bankruptcy Court for a stay which was denied. In re Public Serv. Co. of N.H. 116 Bankr 347 (Bankr. D.N.H. 1990). RKR also asked the District Court for a stay.

The District Court has not yet responded in any manner to RKR's appeal. On June 12, 1991, NU filed a motion to dismiss RKR's appeal. NU claims that since the first step of the Plan has been implemented, RKR's appeal is moot. RKR

disagrees and has objected to the motion.

The PUC Proceeding

As the final hurdle to implementing the Plan, NU and the State had to secure PUC approval of the Agreement. To make that simple, and a sure thing even if PSNH refused to cooperate, the State enacted RSA 362-C.

RSA 362-C authorizes the PUC to approve the Agreement and Plan, or any other plan that was not more costly for the ratepayers, notwithstanding any other provision of law, if the PUC determines that it is consistent with the public good and will resolve the bankruptcy.

On December 22, 1989, the PUC initiated the required proceeding. Until the Confirmation Order was issued, RKR concentrated its limited resources on the confirmation hearing and did not try to get involved in the PUC proceeding.

After the Confirmation Order was

issued, RKR, believing that the PUC could not approve the Agreement without a determination that it was consistent with PSNH's constitutional rights, and could not make that determination because there was no information that would support it, petitioned to intervene so that they could appeal the PUC's approval to the Supreme Court of New Hampshire. The PUC denied their petitions saying they were late and that there was not enough time to consider the constitutional questions.⁶

⁶The PUC order denying Richards' petition is at App. G. The Equity Committee cited Leach v. FDIC, 860 F.2d 1266, 1274-75 (5th Cir. 1988), cert. denied. 109 S.Ct. 3186 (1989) to say that Richards was like the Ghost of Hamlet's Father, a bodiless soul, improperly trying to influence the temporal world. Thinking that that ghost did have some

RKR petitioned the Supreme Court of New Hampshire for a Writ of Prohibition to stop the PUC proceeding on the grounds that RSA 362-C was unconstitutional, because it authorized the PUC to approve the Agreement notwithstanding any other provision of law and effectively prohibited the PUC from approving any more costly plan. That petition was dismissed without prejudice.

The PUC issued its decision on July

impact on Hamlet, and that the analogy was otherwise apt, Richards took some liberties with Shakespeare in a request for rehearing. Excerpts from that pleading are at App. H, excerpts from PSNH's gloating response is at App. I, and the PUC's cryptic Report and Order No. 19,830 is at App.J. It is not clear what the PUC thinks is a lot of sound and fury signifying nothing.

20, 1990. NU had supplemented the record after the Confirmation Hearing, and perhaps in response to RKR's efforts to raise the constitutional questions, by incorporating some of the testimony before the Bankruptcy Court. App. C at 170a-173a. And the PUC, in reliance on that testimony and the opinion of the Bankruptcy Court, held that \$1.5 billion of Seabrook was within the range of what it was likely to allow PSNH to recover in a rate case. App. C at 179a. RKR filed a request for rehearing (App. D)⁷ claiming the following:

1. That the approval resulted in the taking of PSNH's property without just

⁷Pursuant to RSA 541.3 a person can ask for rehearing and appeal a PUC decision, if he is directly affected by it, even if he was not a party to the proceeding. See App. A at 13a.

compensation because the PUC had not determined based on substantial evidence that the Agreement will enable PSNH to recover its prudent investment in used and useful plant.

2. That even if the Constitution did not entitle PSNH to recover prudent investment in used and useful plant, the State had, nevertheless, provided that right by RSA 378:27 and 28 and by passing and implementing RSA 362-C, the State had deprived PSNH and its investors of a vested right.

3. That by passing and implementing RSA 362-C, the State had deprived PSNH and its investors of equal protection of the laws.

4. That RSA 362-C was also unconstitutional on its face, because it authorized the PUC to approve the Agreement without regard to whether it would enable PSNH to recover its prudent investment

and prohibited the PUC from approving any alternative plan of reorganization that would achieve greater value for PSNH.

The PUC held that RKR had no standing to complain since they were mere stockholders, but also said that RKR was wrong on the merits in all respects anyway. It said in particular that PSNH did not have a constitutional right to having its rates set in accordance with RSA 378:27 and :28, as the Constitution did not require the PUC to apply the traditional method of setting rates (App. E at 473a); that the value of PSNH had been determined by the Confirmation Order and PSNH's election to have the rates approved pursuant to RSA 362-C and therefore RKR was not injured by the PUC order; and the fact that PSNH was in bankruptcy justified treating PSNH differently (and apparently worse) than the other New Hampshire utilities. App. E at 475a.

The Appeal to the Court Below

RKR filed a timely appeal with the Supreme Court of New Hampshire. NU urged the court to dismiss RKR's appeal for lack of standing but it also responded on the merits.

CRR and Hilberg appealed as well. They claimed that the PUC had not properly implemented RSA 362-C, because, inter alia, the language in the statement of purposes required the PUC to determine whether the rates were just and reasonable as defined by N.H. law and therefore to determine whether the rates provided a reasonable return on an appropriate rate base.

The court below dismissed RKR's appeal. App. A. It held that RKR could not bring the appeal in their individual capacities, mindlessly applying the general rule that stockholders have no standing to complain about wrongs done to

their corporation. App. A at 16a. It also held that RKR could not bring the appeal as a derivative action on behalf of the corporation because RKR had not named PSNH as a party to the appeal, ignoring the fact that PSNH had joined with NU in opposing the appeal. App. A at 15a.

The court, however, did grant the CRR and Hilberg standing. It held, relying on decisions from other states, that ratepayers are directly affected by rate decisions. App. A at 19a.

The court then held that the PUC had properly implemented RSA 362-C. It said that the legislature had intended by the "just and reasonable" language in the statement of purposes that the PUC determine that the rates were consistent with the requirements of the Constitution, and not with the requirements of RSA 378:27 and :28. App. A at 42a. It then said that since the Constitution did not re-

quire the PUC to use any particular method of determining the justness and reasonableness of rates, it did not require the PUC to use the traditional methods of RSA 378:27 and :28. It said that it was the impact of the rate order that counts but the PUC need not follow any particular method of determining whether the impact was just and reasonable. App. A at 45a. It then concluded that the PUC had properly implemented RSA 362-C and affirmed the order. App. A at 46a.

Thus, despite the fact that the court below dismissed RKR's appeal, it nevertheless expressed its opinion as to what the Constitution requires with regard to just and reasonable rates. And clearly, according to it, the Constitution does not require anything of substance. According to it, the Constitution gives the PUC, as the State and NU have contended throughout this proceed-

ing, essentially unfettered discretion to set just and reasonable rates. According to it, the Constitution permits the PUC to set rates anyway it pleases provided only that it "determine" after all else is said and done that the impact is "just and reasonable". Or in other words, according to the Court below, the Constitution requires only that the PUC put the right label on the impact of a rate order.

Since the court below did express its opinion on what the Constitution requires with regard to just and reasonable rates, RKR respectfully submits that it is appropriate for this Court, if it determines that RKR has standing to present the question, to now consider whether the State took PSNH's property without due process of law when it approved the Agreement without regard to whether it will enable PSNH to recover its prudent

investment in its used and useful property. There is no point in remanding that question back to the court below so that it can say once again that this Court has held that the Constitution requires nothing but the right label on the impact.

The opinion of the court below makes a mockery of the Constitution and all of this Court's decisions in this area since FPC v. Hope Natural Gas Co, 320 U.S. 591 (1944) ("Hope"). According to it, Hope and its progeny are in effect a lot of sound and fury signifying nothing at all. The time is therefore more than ripe for this Court to say clearly and unambiguously that the Constitution does in fact provide real protection to investments in and by the nation's utilities.

REASONS FOR GRANTING THE WRIT

RKR's submits that the mere recitation of what has happened in this case

warrants granting of the writ. The State promised by statute and PUC decision to investors in PSNH that PSNH would be allowed to recover its prudent investment in Seabrook and then when Seabrook was finished and about to go on line, it made a deal with NU in total disregard of that promise. It then authorized the PUC to approve the deal without regard to the promise and the PUC dutifully complied. And then the State's Supreme Court, in what is perhaps the most shocking action of all, held that RKR, stockholders in PSNH, and members of the class that are most severely injured by the State's breach of promise, can not complain.

Surely, what the institutions of the State of New Hampshire have done to the stockholders of PSNH, and to RKR in particular, falls far short of the due process guaranteed by the Constitution.

RKR Should be Granted Standing

The general rule that stockholders do not have standing to complain as individuals about wrongs done to their corporation should not be applied here. Normally wrongs done to corporations do not injure the stockholders directly. Their impacts can not normally be traced to changes in the value of their stock. But that is not true here.

The very purpose of the Agreement was to determine Reorganized PSNH's current rates and base for future rates and therefore the value of Reorganized PSNH's stock. The State intended that approval of the Agreement would have, and it did have, a direct and immediate impact on stockholder wealth. In form, the State confiscated PSNH's property but in substance it confiscated stockholder wealth.

Moreover, the State wronged, as well

as injured, the stockholders directly. PSNH is obliged by RSA 374:1 to serve the public and will serve, if it can, regardless of how it is treated by the State. Therefore, the purpose of RSA 378:27, :28 and :29 is not to induce PSNH to invest in electric facilities, since PSNH is obliged to invest, but rather to induce investors to invest in PSNH so that PSNH can provide service to the public at a reasonable cost. By passing and implementing RSA 362-C, the State breached the promise made to the investors by RSA 378:27 and 28, and therefore wronged them directly.

The court below said that since the alleged wrong was done to all the stockholders, RKR can not complain. Surely, the State's actions can not escape challenge in the courts by stockholders that are able and willing to complain simply because the State has wronged and injured

directly each and every stockholder.

RKR should also be granted standing, if necessary, to bring this action on behalf of the estate of PSNH. Normally, stockholders in a utility can and will rely on management to protect the value of the utility's assets. To our knowledge, no stockholder of a utility has ever before challenged a rate decision. But PSNH is in Chapter 11 and that fact provides a special reason for RKR to challenge the rate decision and a special justification for allowing RKR to do so.

The Bankruptcy Code gives individual stockholders the right to object to and contest a plan of reorganization even if it has been accepted by the debtor, all the committees and all the impaired classes. The Code recognizes that the people who get involved in bankruptcy proceedings and appointed to official committees are in it to serve and protect

their own interests and neither they nor management can be safely relied on to truly represent all parties in interest. Individual parties in interest are given the right to object in order to provide every assurance that their rights will be protected. And the record in this case provides ample reason to believe that neither management nor the Equity Committee were terribly concerned about the welfare of the common stockholders and ample reason to believe that both were quite willing to accept a deal that satisfied them regardless of the impact on the common stockholders.

The Bankruptcy Court said that in order to approve the Plan it must determine that the Agreement was within the range of outcomes from a rate case, and claims to have done it. But it made the determination without hearing any evidence on prudence and without hearing or

articulating any objective principle that would justify limiting recovery to anywhere near 50% of Seabrook. In the end the Bankruptcy Court made nothing but what it characterized as a "surface determination as to whether the plan compromise is fair and equitable (App.K at 630a).

Clearly, if the Bankruptcy Court has acted properly, a state can very easily exploit the processes of the bankruptcy court to avoid the consequences of its own wrongheaded policies and the mandates of this Court with regard to just and reasonable rates. Clearly, in order to provide at least some assurance that that will not happen, individual common stockholders must be given standing to challenge any order issued by the regulatory agency approving rates embodied in the plan of reorganization.

The court below said that standing

rules are necessary to "protect against improper plaintiffs". App. A at 11a. It did not say what or who has to be protected, but clearly denying RKR standing does not protect anything from anybody except the State's confiscation of PSNH's property.

Prudent Investment Should Be the Measure of the Impact of a Rate Order

NU and the State were able to get the Plan accepted and confirmed by claiming that PSNH was not entitled to recover prudent investment in its facilities. The Court should now take this case and declare that PSNH, and the other regulated utilities in the nation, do in fact have that right and that the State, by setting rates without regard to whether they will enable PSNH to recover its prudent investment in Seabrook, took PSNH's property without due process of

law.

The establishment of such a rule is of great importance. If the utilities are not certain that they will be allowed to recover their prudent investments, they will not run any risks. They will not invest in large facilities of any kind, in order to take advantage of perceived economies of scale, and they will not invest in anything but proven technologies. And they surely will not invest in nuclear power even if the nation should believe that that must be done in order to get off foreign oil.

But RKR are not asking the Court to declare that utilities are entitled to recover prudent investment in their facilities because it is in the national interest. The Constitution does not require that the states act in the national interest. It does, however, require that the states grant its citizens

and citizens of other states due process and RKR are asking that the Court now declare that due process requires the states to give the utilities a reasonable opportunity to recover their prudent investments.

Ever since Hope the states have declared either by statute, like New Hampshire with RSA 378:27 and :28, or by court decision as in New York that their utilities can recover the original cost of their prudent investments. That was the promise and the expectation. To change the rule after the fact with regard to particular investments that turn out to be uneconomic is fundamentally unfair and should be declared by this court to be a taking of property without due process of law.

And RKR are not asking the Court to now reverse its long line of decisions beginning with Hope and ending with

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) to the effect that the Constitution does not require the states to adopt any particular method of setting rates. RKR are not asking that the Court require the states to take into account prudent investment in developing their ratemaking formulae, but only that the Court require the states to take prudent investment into account when measuring the impact of a rate order.

And RKR are not even asking the Court to hold that states be foreclosed from ever adopting some other measure of the impact but only that if a state wants to adopt some other measure with regard to any or all investments, it do so prospectively and not retroactively. (And of course if a state represents before the fact that it will apply some other measure to a particular investment, it must honor that representation as well.)

Such a clear rule would of course put to rest the notion that New Hampshire can now deny PSNH the recovery of prudent investment in Seabrook in order to effect some sort of sharing of the cost of excess capacity. New Hampshire may want to adopt such a rule but fundamental fairness requires and due process should require that New Hampshire do it before the fact.

The Supreme Court of New Hampshire suggested that the PUC can apply such a notion to the prudent cost of Seabrook in Appeal of Conservation Law Foundation of New England, 127 N.H. 606, 647, 507 A.2d 652, 680 (1986), but by then Seabrook was essentially finished. And neither the Supreme Court of New Hampshire nor the PUC has yet articulated how the notion might actually be applied to Seabrook or any other asset. The Bankruptcy Court said that investors in PSNH had been

given ample warning that some such rule might be applied to Seabrook (App. K at 615a, 618a), but surely the mere suggestion of the notion after Seabrook was finished is no warning at all.

Clearly, up until the time Seabrook was finished, PSNH had a right to recover prudent investment in its facilities and this Court should now hold that the State, by approving the Agreement without regard to whether it would enable PSNH to recover its prudent investment in Seabrook, took PSNH's property and the property of investors in PSNH without due process of law.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A. M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Utilities Commission
No. 90-406

APPEAL OF ROBERT C. RICHARDS,
EDWARD KAUFMAN AND MARTIN ROCHMAN

APPEAL OF CAMPAIGN FOR
RATEPAYERS RIGHTS AND JOHN V. HILBERG

(New Hampshire Public Utilities
Commission)

April 24, 1991

Robert C. Richards, of New York, New York, by brief and orally, pro se.

Edward Kaufman, of Scarsdale, New York, by brief and orally, pro se.

Martin Rochman, of Palm Beach, Florida, by brief, pro se.

Backus, Meyer & Solomon, of Manchester (Robert A. Backus on the brief and orally), for Campaign for Ratepayers Rights and John Hilberg.

Rath, Young, Pignatelli and Oyer P.A., of Concord, and Day Berry and Howard, of Hartford, Connecticut, for Northeast Utilities Service Company, and Sulloway Hollis and Soden, of Concord, for Public Service Company of New Hampshire (Thomas D. Rath and Martin L. Gross on the brief, and Mr. Rath orally).

John P. Arnold, attorney general (Harold T. Judd, assistant attorney general, on the brief and orally), for the State.

John J. Lahey for Business & Industry Association of New Hampshire, and Michael W. Holmes for Office of Consumer Advocate, by brief, as amici curiae.

PER CURIAM. In these consolidated appeals, the appellants challenge a decision of the New Hampshire Public Utilities Commission (the PUC) approving a rate plan contained in an agreement relating to the reorganization of Public Service Company of New Hampshire (PSNH)

that was negotiated by Northeast Utilities Service Company (NU) and the State. This decision was issued in the PUC's docket DR 89-244 and reported in Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR4th 385 (N.H.P.U.C. 1990). The appellants are as follows: Robert C. Richards, Edward Kaufman, and Martin Rochman, who are PSNH stockholders (hereinafter referred to as "the appealing stockholders"); John Hilberg, who is a PSNH ratepayer; and Campaign for Ratepayers Rights (CRR), which is a ratepayer group. The rate plan provides for average base retail rate increases of 5.5% per year for seven years, beginning January 1, 1990, and is an integral part of the agreement whereby NU would acquire PSNH, the State's largest electric utility, for \$2.3 billion. Although the appealing stockholders argue that the average base

retail rate increases are too low, and Hilberg and CRR argue that they are too high, both sets of appellants contend that the PUC improperly approved the rate plan without a finding that the rates would be produced by the rate plan are "just and reasonable" in accordance with traditional ratemaking principles. For the reasons that follow, we affirm the PUC's decision and dismiss the appeals.

I. Facts and Procedural History.

This is an unusual case, in that it involves a public utility that has declared bankruptcy. See Darr, Federal-State Comity in Utility Bankruptcies, 27 Am. Bus. L.J. 63, 64 (1989). PSNH filed for bankruptcy under chapter 11 of the federal Bankruptcy Code on January 28, 1988, citing as the reasons therefor: the magnitude of its investment in Seabrook Nuclear Generating Station Unit 1 (Seabrook); the delay in obtaining

licensing approval from the federal Nuclear Regulatory Commission; and its inability to realize any return on its investment until Seabrook went on line, due to the New Hampshire Legislature's enactment of RSA 378:30-a, the so-called "anti-CWIP" law, which prohibits utilities from charging rates that would enable them to recover the cost of "construction work in progress." Re Northeast Utilities, supra at 391-92.

The bankruptcy court authorized the State to intervene in the proceedings, whereupon the State entered into negotiations with PSNH management and NU, among others, regarding the possible level of rates that could be charged by the reorganized company. Re Northeast Utilities, supra at 392. On November 22, 1989, the State and NU signed an agreement which provided for a merger of PSNH with NU, at an acquisition cost of

\$2.3 billion, and which included the 5.5% rate plan. Re Northeast Utilities, supra at 392-393.

In a one-day special session held on December 14, 1989, the legislature adopted a statute which authorized the PUC to review and implement the agreement. This legislation, RSA chapter 362-C (Supp. 1990), became effective on December 18, 1989. The legislature stated that the purpose of the statute was to authorize the PUC

"to determine whether a proposed agreement relating to the reorganization of Public Service Company of New Hampshire and, upon receipt of required regulatory approvals, the acquisition of Public Service Company of New Hampshire by Northeast Utilities, would be consistent with the public good and whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved."

RSA 362-C:1, IV (Supp. 1990) (emphasis

supplied). To effectuate this purpose, RSA 362-C:3 (Supp. 1990) authorized the PUC,

"after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates . . . in accordance with, and during the time periods set forth in, the agreement."

(Emphasis supplied.)

Pursuant to this statute, the PUC held hearings on the merits between April 9, and May 5, 1990, and hearings on rebuttal and supplemental testimony from May 22 to 25, 1990. Re Northeast Utilities, 114 PUR4th at 395. Hilberg is the only appellant who was a party to the proceedings before the PUC. In the meantime, the bankruptcy court confirmed

NU's reorganization plan on April 20, 1990, id. at 393, subject to the PUC's approval of the rate plan. See 11 U.S.C. § 1129 (a)(6) (1988) (the bankruptcy court's confirmation of a reorganization is subject to the approval of any rate change provided for in the plan by any governmental regulatory commission with jurisdiction over the rates of the debtor).

Appellants Richards, Kaufman, and Rochman moved separately to intervene in the proceedings before the PUC, but their motions were denied as untimely. Re Northeast Utilities, 114 PUR4th at 395. Appellant Richards thereafter filed a petition in this court, on behalf of himself and appellants Kaufman and Rochman, for a writ of prohibition to the PUC. We denied this petition without prejudice on June 18, 1990.. The appealing stockholders are presently

appealing the bankruptcy court's confirmation order in federal district court.

The PUC approved the rate plan in an order issued on July 20, 1990. See id. at 469-70. The order was accompanied by an extensive written decision, in which the PUC explained its analysis of the average base retail rate increases contained in the rate plan and summarized the evidence supporting its findings. It concluded that "the implementation of the Rate Plan as set forth herein is consistent with the public good . . . and will result in just and reasonable rates that equitably balance the interests of ratepayers and investors." Id. at 460.

The PUC reached its decision after comparing the rate of return to the cost of capital under the rate plan. Id. at 405-08. It also compared the rates under the rate plan with rates forecast for

other New England utilities, id. at 411-12, and the rates estimated, insofar as foreseeable, under traditional ratemaking principles, id. at 410-11. The PUC stated that the rates resulting from the use of those provided for by the rate plan, but that it was not required to calculate the precise level of rates under traditional ratemaking principles "to determine whether the Rate Plan serves the public good with just and reasonable rates over the fixed rate period." Id. at 410. Moreover, it asserted that "[d]etermination of just and reasonable rates by traditional ratemaking methodology, is precluded by the Rate [Plan's] prescribing the level of retail rates over the seven year fixed rate period." Id. at 408. The PUC nonetheless estimated the rates that would be achieved under traditional ratemaking principles, insofar as

foreseeability permitted. See id. at 410.

The appealing stockholders, and Hilberg and CRR, subsequently filed motions for rehearing. The PUC denied their motions on August 17, 1990, and these appeals followed.

II. Standing and Preservation of the Issues

Before reaching the appellants' arguments, we must first address the contention shared by the State, and NU and PSNH, that the appellants lack standing. For a court to hear a party's complaint, the party must have standing to assert the claim. 59 Am. Jur. 2d Parties § 30 (1987); see also State ex rel. Thomson v. State Bd. of Parole, 115 N.H. 414, 419, 342 A. 2d 634, 637 (1975) (noting that the purpose of the law of standing is to protect against improper plaintiffs). After an administrative agency has denied an individual's motion for rehearing

filed pursuant to RSA 541:3, in order to have standing to appeal the agency's decision to this court, he must demonstrate that his rights "may be directly affected" by the decision, see RSA 541:3 and :6, or in other words, that he has suffered or will suffer an "injury in fact." See New Hampshire Bankers' Ass'n v. Nelson, 113 N.H. 127, 129, 302 A. 2d 810, 811 (1973); see also Blanchard v. Railroad, 86 N.H. 263, 264-66, 167 A. 158, 159-60 (1933) (holding that a party to an administrative proceeding does not have standing to appeal an administrative agency's decision absent a showing of direct injury). Similarly, a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected. 59 Am. Jur. 2d Parties § 33 (1987). Thus, to have standing to appeal the PUC's decision, the appealing

stockholders and Hilberg and CRR, must demonstrate that they have been "directly affected" by it.

In addition, the appellants must show that the issues raised have been properly preserved for appeal. To appeal a decision or order of the PUC, one must first file a motion for rehearing with the PUC stating "fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. A party or any person directly affected by the PUC's decision or order may apply for a rehearing with respect to "any matter determined in the action or proceeding, or covered or included in the order." RSA 541:3 (emphasis supplied). If the motion for rehearing is denied, the party may then appeal by petition to this court. RSA 541:6. Issues not raised in the motion for rehearing may not be

raised on appeal. See RSA 541:4.

A. The Appealing Stockholders

Appellants Richards and Kaufman are holders of PSNH common stock. Appellant Rochman is a beneficial owner of PSNH common stock recorded in his wife's name. Collectively they own 195,000 shares, which is less than one percent of PSNH's outstanding stock. The appealing stockholders assert that the PUC's decision approving the rate plan resulted in a violation of their, and PSNH's. constitutional and statutory rights to recover their "prudent" investment in PSNH plant "used and useful" in the generation of electricity, and that they have been injured, in that the value of their PSNH stock has decreased. They argue that they should be permitted to bring the present appeal in their capacities as individual stockholders or, alternatively, on behalf of PSNH.

Because the appealing stockholders have not named PSNH as a party to their appeal, we do not address the issue of whether they have standing to appeal in a derivative capacity. See Kidd v. Traction Co., 72 N.H. 273, 286-88, 56 A. 465, 469 (1903) (stating that a corporation is a necessary party to a derivative action); 13 W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 5997, at 277 (rev. perm. ed. 1984).

In general, a corporation's board of directors, rather than its stockholders, has the authority to bring an action to redress an injury to the corporation. See 13 W. Fletcher, supra § 5963, at 111. Nevertheless, a stockholder's rights may be directly affected, entitling him to sue in his individual capacity, "(1) where there is a special duty, such as a contractual duty, between the wrongdoer

and the shareholder, [or] (2) where the shareholder suffered an injury separate and distinct from that suffered by other shareholders," 12B W. Fletcher, supra § 5911, at 421, or by the corporation itself, Gaff v. Federal Deposit Ins. Corp., 814 F. 2d 311, 315 (6th Cir. 1987). A diminution in stock value is an injury that does not fall within either of these two categories and, thus, does not give a stockholder standing to sue on his own behalf. See Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1113 (D.R.I. 1990)

The appealing stockholders have not alleged a direct injury as a result of the PUC's decision approving the rate plan. Nor have they alleged a constitutional violation of their rights that is distinguishable from a violation of the rights of PSNH or other PSNH stockholders. Accordingly, we hold that

they have no standing under RSA chapter 541 to prosecute the present appeal, and, therefore, their appeal is dismissed.

B. Appellants Hilberg and CRR

NU and PSNH contend that appellants Hilberg and CRR also lack standing. Specifically, they argue that Hilberg's status as a ratepayer and the ratepayer status of CRR's members is insufficient to confer standing, absent a showing by Hilberg that he, and by CRR, that its ratepayer members, have been directly affected by the PUC's decision. Hilberg and CRR, on behalf of its ratepayer members, allege that the rate increases that will be imposed upon them as result of the PUC's approval of the rate plan constitute an "injury in fact" that gives them standing to bring this appeal. In rejoinder, NU and PSNH, citing Blanchard v. Railroad, 86 N.H. 263, 167 A. 158 (1933), maintain that the injury alleged

by Hilberg and CRR is no different than an injury to the public in general, and that only the Attorney General and the Office of Consumer Advocate are authorized to represent the public in this instance.

No individual or group of individuals has standing to appeal when the alleged injury caused by an administrative agency's action affects the public in general, particularly when the affected public interest is represented by an authorized official or agent of the State. See Blanchard v. Railroad, supra at 264-65, 167 A. at 159. This is simply another way of formulating the "injury in fact" or "direct effect" requirement. Similarly, an association has no standing to challenge an administrative agency's action based upon a "mere 'interest in a problem.'" Sierra Club v. Morton, 405 U.S. 727, 739

(1972). It does, however, have standing to represent its members if they have been injured. Id.

Unlike the plaintiff in Blanchard v. Railroad, in which "[t]he only interest alleged to have been infringed by the order is that of the public," supra at 264, 167 A. at 158, Hilberg alleges that he, and CRR alleges that its ratepayer members, will suffer a direct economic injury. Courts in other jurisdictions have held that ratepayers are directly affected by rate decisions and, thus, have standing to challenge them. See Iowa-Ill. Gas & Elec.v. Iowa S.Com. Com'n, 347 N.W.2d 423, 426-27 (Iowa 1984) (citing cases); see also City of Houston v. Public Utility Com'n, 618 S. W. 2d 428, 431 (Tex. Civ. App. 1981) (stating that cities, as ratepayers, were "aggrieved" by the public utility commission's order, in that the increase

in electric rates imposed upon them an added financial obligation or burden); Tripps Park v. Pa. Public Utility Com'n, 415 A. 2d 967, 970 (Pa. Commw. Ct. 1980) (holding that Tripps Park, an association whose members included utility customers, had standing to appeal a public utility commission rate order). We therefore hold that Hilberg, as a PSNH ratepayer, and CRR, as the representative of its PSNH ratepayer members, have standing to bring this appeal under RSA chapter 541.

NU and PSNH maintain that Hilberg and CRR, even if they have standing to appeal the PUC's decision, have failed to properly preserve their claims for appeal by raising them in a timely manner. In this appeal, Hilberg and CRR argue first that the PUC erred in approving the rate plan, because it failed to employ the proper analysis to determine whether the

average base retail rate increases contained in the rate plan will produce rates that are "just and reasonable"; namely, "traditional ratemaking analysis." Second, they assert that the PUC was required to consider whether the placement of PSNH's Seabrook assets into a separate corporation, as provided for by the agreement, would be in the "public good." Finally, they appear to raise a due process issue in their brief, but this argument is merely a restatement of their first argument that the PUC did not properly analyze the rates under the rate plan in accordance with traditional ratemaking principles. Hilberg and CRR included the first issue, and arguably the third, but not the second, as grounds for their joint motion for rehearing filed with the PUC. NU and PSNH argue that these claims were not properly preserved for appeal, because Hilberg and

CRR did not raise them during the PUC proceedings or offer any evidence during the proceedings to support them.

Since Hilberg and CRR did not include the second issue as one of the grounds for their motion for rehearing, they are precluded from raising it on appeal. See RSA 541:4. Additionally, because they made only passing reference to "due process" in their brief, did not cite any constitutional provisions, and did not address this issue during oral argument, we hold that they have not properly preserved the third issue for appeal. See State v. Isaacson, 129 N.H. 438, 439-40, 529 A. 2d 923, 924 (1987). However, as to the first issue, we reject NU and PSNH's argument that Hilberg and CRR are barred from raising it on appeal because they did not raise it during the PUC proceedings or offer any evidence during the proceedings to

support it. Hilberg and CRR would have been unable to discover the alleged error made by the PUC, i.e., that it used the incorrect analysis to approve the rate plan, prior to the issuance of the PUC's decision. Cf. Appeal of Cheney, 130 N.H. 589, 594, 551 A. 2d 164, 167 (1988) (stating that parties "are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected"). Moreover, this issue is a legal, rather than a factual one, in support of which it was not necessary to introduce additional evidence during the PUC proceedings. Because this issue was discussed by the PUC in its decision and raised in Hilberg and CRR's motion for rehearing, we hold that it is properly raised on appeal.

To summarize, we hold that the appealing stockholders have no standing

to bring the present appeal, and that although Hilberg and CRR have standing, they have failed to preserve for appeal the second and third issues raised in their brief.

The sole remaining issue is whether the PUC erred in approving the rate plan, because it failed to employ traditional ratemaking analysis to determine whether the average base retail rate increases contained in the rate plan will produce rates that are "just and reasonable."

III. Standard of Review

In addressing this issue on appeal, we apply the standard of review set forth in RSA 541:13. A party seeking to set aside a decision of the PUC has the burden of demonstrating that the decision is unlawful, or, by a clear preponderance of the evidence, that it is unjust or unreasonable. Additionally, findings of

fact made by the PUC are presumed to be prima facie lawful and reasonable. RSA 541:13; see Appeal of Cheney, 130 N.H. at 592, 551 A.2d at 166. —

IV. The Analysis Required of the PUC

In this case, we are dealing with an issue of the delegation of legislative power. Subject to acknowledged constitutional limitations, considered below, the regulation of utilities and the setting of appropriate rates to be charged for public utility products and services is the unique province of the legislature. Duquesne Light Co. v. Barasch, 488 U.S. 299, 313 (1989); The Minnesota Rate Cases, 230 U.S. 352, 433 (1913); see LUCC v. Public Serv. Co. of N.H. 119 N.H. 332, 340, 402 A. 2d 626, 631 (1979). For substantially all of such regulation, the legislature has recognized the need for expertise not readily available as part of legislative

resources, and has therefore delegated its power to a standing regulatory commission of the legislature's creation. RSA ch. 363. The delegated power is exercised in the area of ratemaking, RSA ch.378, which is conducted through ongoing supervision of rate schedules filed with the PUC. In the traditional ratemaking proceeding, when the utility files for a change in rates under RSA chapter 378, a course of action, well defined by that chapter, the PUC's regulations and the decisions of this court, is undertaken. In the reorganization of PSNH under the State's agreement with NU, the traditional approach could have been employed, initiated by a PSNH filing for standard and appropriate changes to its existing rates. The rate element of the reorganization could have come to the PUC, in the normal course, under the

existing statutory delegation and with all of the judicial requirements attached. However, the rate element of the reorganization was far from traditional, since it envisioned contractual protections for NU, through a contractual guarantee of rates designed to cover the cost of acquisition required to be paid by NU. The contractual rates were intended to be in effect far beyond the period normally and historically appropriate for this utility.

The legislature, citing special needs and circumstances in the situation, RSA 362-C:1 (Supp. 1990), saw fit to provide in this statute a special delegation to the PUC of power to review this agreement. RSA ch. 362-C (Supp. 1990). Its delegating charge was for the PUC to "determine whether the implementation of the agreement would be consistent with the public good." RSA

362-C:3 (Supp. 1990). It charged that, if such a determination is made, "notwithstanding any other provision of law," the contracted rates shall be established and placed in effect for the contracted period. Id. In exercise of this authority to determine the public good, the legislature authorized the PUC to inquire into "whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved." RSA 362-C:1, IV (Supp. 1990). The parties disagree as to whether in such consideration of the rates stipulated by the agreement, by using the phrase "just and reasonable," the legislature intended the PUC to apply traditional ratemaking principles. Hilberg and CRR assert that the statute's reference to the "just and reasonable" standard, which is also found in existing

"traditional" ratemaking statutes, e.g., RSA 378:7 and :28, indicates that the legislature wanted the PUC to undertake a traditional ratemaking procedure, and judge the rates under the rate plan according to established "just and reasonable" standards, or, in other words, conduct a "traditional ratemaking analysis." By "traditional ratemaking analysis," Hilberg and CRR refer to the ratemaking process described in Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A. 2d 652 (1986).

According to this process, rates are determined using the following formula: $R = O + (B \times r)$, where R = required revenue, O = allowed operating expenses, B = rate base and r = rate of return. Id. at 633, 507 A. 2d at 671; Petition of Public Serv. Co. of N.H., 130 N.H.265, 270-71, 539 A. 2d 263, 266 (1988), appeal dismissed, 488 U.S. 1035 (1989). The PUC

first determines the appropriate values of the three variables in the formula: rate base, rate of return, and the utility's allowed operating expenses. Appeal of Conservation Law Foundation, 127 N.H. at 633-40, 507 A. 2d at 671-75. Rate base is defined as " 'the amount of money that the utility has invested in capital assets (like generating plant and transmission lines) that it uses to provide services to its customers.'" Id. at 634, 507 A. 2d at 671 (quoting Glicksman, Allocating the Cost of Construction Excess Capacity: "Who Will Have To Pay For It All/," 33 Kan. L. Rev. 429, 432 (1985). It may only include property that is "used and useful" in the generation of electricity, in which the utility's investment was "prudent" at the time made. Id. at 637-38, 507 A. 2d at 673-74. The rate of return, "a percentage applied to the rate base

expressed as a dollar amount in order to produce 'interest on long-term debt, dividends on preferred stock, and earnings on common stock (including surplus or retained earnings),' " id. at 635, 507 A. 2d at 672 (quoting C. Phillips, Jr., The Regulation of Public Utilities 332 (1985)), should "yield a return comparable 'to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties[.]'" Id. (quoting Bluefield Co. v. Publ. Serv. Comm., 262 U.S. 679, 692 (1923)). Once it has determined the values of the three variables, the PUC then calculates the utility's allowed revenue requirement, from which rates are derived. Id. at 633-40, 507 A. 2d at 671-75.

Hilberg and CRR note, quoting Appeal of Conservation Law Foundation, that "any attempt to judge reasonableness [of rates] apart from [the traditional ratemaking] process would . . . risk . . . unconstitutionality." See id. at 639, 507 A. 2d at 674. NU and PSNH, on the other hand, maintain that to interpret RSA 362-C:3 (Supp. 1990) as requiring the PUC to apply these statutory ratemaking requirements in its analysis of the rate plan would nullify the statute's purpose, because it would then "be impossible to approve the Rate Agreement." The State, and NU and PSNH also argue that traditional ratemaking analysis is not constitutionally required. They contend that even if it were required, the PUC satisfied this requirement by finding that the rate plan would be consistent with traditional ratemaking principles.

We note at the outset that the PUC did estimate, insofar as reasonably foreseeable, what rates would be produce using traditional ratemaking methodology, and that it compared these rates to the rates under the rate plan. See Re Northeast Utilities, 114 PUR4th at 410. Hilberg and CRR apparently claim that this comparison was invalid, because the PUC was required to, but did not, conduct a full-blown ratemaking proceeding, as part of which a determination of the "prudent" and "used and useful" value of Seabrook would be made. We base our discussion on this characterization of their argument.

A. Under RSA 362-C:3

To resolve Hilberg and CRR's argument that RSA 362-C:3 (Supp. 1990) obligated the PUC to apply traditional ratemaking principles in its analysis of the rates under the rate plan,

"principles of statutory interpretation require us to look first at the statutory language itself," Petition of Jane Doe, 132 N.H. 270, 276, 564 A. 2d 433, 438 (1989), for the words used in the statute are the best indication of legislative intent. See Chambers v. Geiger, 133 N.H. 149, 152, 573 A.2d 1356, 1357 (1990). When possible, a statute will be interpreted in a manner consistent with its plain meaning. Petition of Jane Doe, 132 N.H. at 276-77, 564 A.2d at 438. "We also examine a statute in relation to the statutory scheme." State v. Taylor, 132 N.H. 314, 318, 566 A.2d 172, 174 (1989).

The operative section of RSA 362-C, section 3, provides:

"The commission is authorized . . . to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall,

notwithstanding any other provision of law, establish and place into effect the levels of rates . . . in accordance with, and during the time periods set forth in, the agreement."

(Emphasis supplied.) In making this determination of consistency with the public good, RSA 362-C:3 (Supp. 1990) authorizes the PUC to determine whether the rate plan contained in the agreement will produce rates that are "just and reasonable and should be approved." Since this consideration is specifically mentioned in RSA 362-C:1, IV (Supp. 1990), it is essential to the operative determination of public good. State v. Perra, 127 N.H. 533, 537, 503 A. 2d 814, 816-17 (1985) (stating that statutes shall be interpreted to effectuate the legislature's expressed intent). RSA 362-C:3 (Supp. 1990) does not, however, expressly require the PUC to undertake any particular analysis of the rate plan.

Hilberg and CRR argue that, because the legislature in its declaration of purpose and findings specifically used the phrase "just and reasonable," a term of art found in traditional ratemaking statutes, it intended the PUC to use traditional ratemaking analysis to assess the rates under the rate plan.

It does not follow from the fact that the phrase "just and reasonable" is used in traditional ratemaking statutes that these statutes apply in the present case. In Petition of Public Service Co. of New Hampshire, a case decided subsequent to our decision in Appeal of Conservation Law Foundation, we stated that in the constitutional sense of the phrase,

"[a] just and reasonable rate is one that, after consideration of the relevant competing interests, falls within the zone of reasonableness between confiscation of utility property or investment interests and

ratepayer exploitation."

130 N.H. at 274, 539 A.2d at 268. Thus, we have recognized two "just and reasonable" standards: a statutory standard and a broader, constitutional standard. The question that remains is whether the legislature intended the statutory "just and reasonable" standard to apply in addition to the constitutional "just and reasonable" standard.

It is significant that the only place the phrase "just and reasonable" appears in RSA chapter 362-C (Supp. 1990) is in its "Declaration of Purpose and Findings," RSA 362-C:1 (Supp. 1990), and not in RSA 362-C:3 (Supp. 1990), the operative section. That the legislature used the phrase only in the declaration of purpose and findings section is consistent with a determination that it was using the phrase in the broader,

constitutional sense, rather than in the more specific, statutory sense. The legislature's omission of the phrase "just and reasonable" from RSA 362-C:3 (Supp. 1990), entitled "Action by the commission," indicates that the legislature did not intend to require the PUC to undertake traditional ratemaking analysis. Had the legislature intended the PUC to do so, it could easily have made this an express requirement. It is not the function of this court to add provisions to the statute that the legislature did not see fit to include. Sigel v. Boston & Maine R.R., 107 N.H.8, 23, 216 A.2d 794, 805- (1966). Furthermore, the legislature's mandate that, having determined public good, the contracted rates are to be implemented as agreed, "notwithstanding any other provision of law," calls more for contract review and ratification than for

creative ratemaking.

Interpreting RSA 362-C:3 (Supp. 1990) so as to require the PUC to use traditional ratemaking analysis would also directly contravene the express intent of the legislature in enacting RSA chapter 362-C (Supp. 1990). Cf. Quality Carpets, Inc. v. Carter 133 N.H. ___, ___, ___ A.2d ___, ___ (decided March 8, 1991) (stating that "[w]e will construe statutes 'so as to effectuate their evident purpose'" (quoting State v. Sweeney, 90 N.H.127, 128, 5 A.2d 41, 41 (1939))). The legislature stated the following as reasons for its enactment of RSA chapter 362-C (Supp. 1990):

"I. The health, safety and welfare of the people of the state of New Hampshire and orderly growth of the state's economy require that there be a sound system for the furnishing of electric service.

II. The bankruptcy of the state's largest electric utility, Public Service Company of New Hampshire,

has threatened the adequacy, reliability and cost of electric service.

III. The present and predicted growth in electric service demands in the state of New Hampshire requires a prompt resolution of the bankruptcy and reorganization of Public Service Company of New Hampshire."

The predominant purpose of RSA chapter 362-C (Supp. 1990) was to expedite the resolution of the PSNH bankruptcy by authorizing the PUC, upon a finding of public good, to approve and implement the agreement, which would resolve the PSNH bankruptcy by providing for a reorganization of the utility.

An effort at traditional ratemaking would involve a complex process which, as we noted above, consists of a number of steps. See Appeal of Conservation Law Foundation, 127 N.H. at 633-40, 507 A.2d at 671-75. If RSA 362-C:3 (Supp./1990) were interpreted as Hilberg and CRR suggest, the PUC essentially would be

required to hold a ratemaking proceeding which could take as long as one or two years. See C. Phillips, Jr., The Regulation of Public Utilities 732 (1985) (stating that "[f]rom start to finish, the proceedings averaged more than . . . 21 months for ratemaking.'" (quoting a Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation 7 (1977))). As a consequence of this interpretation of RSA 362-C:3 (Supp. 1990), the resolution of the PSNH bankruptcy would be delayed rather than expedited, a result that was clearly not intended by legislature. Further, the agreement was not an appropriate subject for traditional ratemaking. Its contractual nature, its stipulated rate base and its extended term would have made traditional ratemaking a sham or exercise in futility.

Based upon the foregoing analysis,

we hold that RSA 362-C:3 (Supp. 1990) did not require the PUC to analyze the rate plan in accordance with traditional ratemaking principles. By using the phrase "just and reasonable," the legislature referred to the constitutional "just and reasonable" standard, rather than the "just and reasonable" standard found in traditional ratemaking statutes, applicable to traditional ratemaking procedures, and discussed in Appeal of Conservation Law Foundation.

B. Under Constitutional Law

Hilberg and CRR also appear to argue that the PUC was constitutionally required to apply traditional ratemaking analysis. Again, they cite Appeal of Conservation Law Foundation as authority.

In Appeal of Conservation Law Foundation, we noted that "any attempt to judge reasonableness [of rates] apart

from [the traditional ratemaking] process would . . . risk . . . unconstitutionality." 127 N.H. at 639, 507 A.2d at 674. We did not, however, foreclose the possibility that there existed other constitutionally permissible means of determining "just and reasonable" rates, nor should our holding in that case be construed as unconditionally requiring the use of that traditional ratemaking methodology.

A holding that the use of that traditional ratemaking formula is constitutionally required would be contrary to well-established federal constitutional case law. In Federal Power Commission v. Hope Natural Gas Co., 320 U.S.591 (1944), the seminal case in this area, the United States Supreme Court held that the Federal Natural Gas Act, 15 U.S.C. @717 (1988), does not require the use of any particular formula

in determining rates. Id. at 602. The Court stated that the methodology used to set rates is irrelevant. See id. Instead, it is the result reached that is important: "[i]f the total effect of the rate order cannot be said to be unjust or unreasonable, judicial inquiry . . . is at an end." Id. Although the Court decided the case under the Federal Natural Gas Act, it noted that "there are no constitutional requirements more exacting than the standards of the Act." Id. at 607.

The holding in Hope has been followed in numerous subsequent Supreme Court cases. In Wisconsin v. Federal Power Commission, 373 U.S.294 (1963), the Court stated:

"[T]o declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly

articulated approach to the question of the [Federal Power] Commission's power to regulate rates. It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates."

Id. at 309 (emphasis supplied). Most recently, in Duquesne Light Co.v. Barasch, 488 U.S. 299 (1989), the Court reaffirmed the principle that "[i]t is not the theory, but the impact of the rate order which counts.'" Id. at 314 (quoting Hope, 320 U.S. at 602); see also Petition of Public Serv. Co. of N.H., 130 N.H. at 275, 539 A.2d at 268 (stating that the Federal Constitution is concerned with only the end result of a rate order). Accordingly, the PUC was not constitutionally required to apply traditional ratemaking principles in its analysis of the rates under the rate plan.

V. Conclusion

In conclusion, we hold that RSA 362-C:3 (Supp. 1990) did not obligate the PUC to analyze the rate plan in accordance with traditional ratemaking principles, nor would such methodology be practical or consistent with the legislative delegation. Further, we hold that traditional ratemaking analysis was not constitutionally required in this case. Since Hilberg and CRR neither argue nor demonstrate that the total effect of the rate plan is unjust or unreasonable, we hold that they have failed to sustain their burden of proof to show that the PUC's decision approving the rate plan was unlawful or unreasonable. Therefore, the PUC's decision must be affirmed. See Appeal of Cheney, 130 N.H. at 592, 551 A.2d at 166.

Affirmed; appeals dismissed.

BROCK, C.J., and BATCHELDER, J.,
dissented.

BROCK, C.J., and BATCHELDER, J.,dissenting: In this appeal we are asked to determine the legislative intent behind RSA 362-C:3 (Supp. 1990), specifically, whether the legislature intended to require the PUC to analyze the rates under the rate plan negotiated by NU and the State in accordance with existing statutory ratemaking standards. Our decision today will affect electric ratepayers all over New Hampshire for the period remaining under the rate plan and perhaps longer. For the reasons hereinafter set forth, we believe that the majority has incorrectly interpreted RSA 362-C:3 (Supp. 1990) to reach a result that was not intended by the legislature, and, in addition, that they have misapprehended federal constitutional ratemaking requirements discussed both in federal cases and in the decisions of this court.

1. The Statutory "Just and Reasonable" Standard is Presumed to Apply

Reading RSA 362-C:3 (Supp. 1990) to effectuate one of the legislature's express purposes in enacting RSA chapter 362-C (Supp. 1990), see 2A N. Singer, Sutherland Statutory Construction § 58.06, at 723 (Sands 4th ed. 1984), it is clear that the PUC was required to determine whether the rates under the rate plan are "just and reasonable." Although not defined in RSA chapter 362-C (Supp. 1990), "just and reasonable" is a term of art used in RSA 378:7. RSA 378:7, entitled "Fixing of Rates by Commission." requires the PUC to set "just and reasonable" rates, or rates that are "sufficient to yield not less than a reasonable return on the cost of the property of the utility used and useful in the public service less accrued depreciation." See RSA 378:27

and :28. According to well-established canons of statutory construction, it is assumed not only that the legislature was aware of this statutory "just and reasonable" standard, see Wyatt v. Board of Equalization, 74 N.H. 552, 557, 70 A. 387, 390 (1908) (stating that a statute "must be read in the light of the circumstances then existing," including "the law as it was then declared"), but that, by using the term "just and reasonable" when it enacted RSA chapter 362-C (Supp. 1990), the legislature intended this standard to apply.

"It is assumed that whenever the legislature enacts a provision, it has in mind previous statutes relating to the same subject matter . . .

. . . .

Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense."

Appeal of Town of Hampton Falls, 126 N.H.805, 809-10, 498 A.2d 304, 307 (1985) (emphasis added) (quoting 2A N. Singer, Sutherland Statutory Constuction § 51.02, at 453-54 (Sands 4th ed. 1984) (footnotes omitted)).

This court further defined the term "just and reasonable" in Appeal of Conservation Law Foundation, 127 N.H. 606, 507 A.2d 652 (1986). In that case, we stated that, given the above-cited statutes, the term "reasonable" or "just and reasonable" rate

"must be understood as referring to the result of the ratemaking process. The ratemaking process fixes rates that will satisfy a utility's revenue requirement. Reduced to its essentials, this revenue requirement may be expressed as a formula: $R = O + (B \times r)$, where R is the utility's allowed revenue requirement; O is its allowed operating expense; B is its rate base, defined as cost less depreciation of the utility's property that is used and useful in the public service, see RSA 378:27; and r is the rate of return allowed on the rate

base."

Id. at 633-34, 507 A. 2d at 671 (emphasis added). The court went on to discuss at some length "both the standard of reasonable rates and the commission's responsibility in light of that standard." Id. at 633, 507 A.2d at 671.

There is nothing in either the language or the legislative history of RSA chapter 362-C (Supp. 1990) to rebut the presumption that the legislature intended the phrase "just and reasonable" to refer to the statutory "just and reasonable" standard. The legislature's use of the phrase "notwithstanding any other provision of law" does not, contrary to what NU and PSNH argue, indicate that it did not intend the statutory "just and reasonable" standard to apply, because this language neither limits nor

describes the analysis the PUC was required to undertake in order to assess the reasonableness of the rates under the rate plan. Nor does the fact that the phrase "just and reasonable" appears only in RSA 362-C:1 (Supp. 1990), entitled "Declaration of Purpose and Findings," mean that the legislature was using it in its broader, constitutional sense. It is only logical that this phrase, provided that it is used in the same context, has the same meaning regardless of its location in the statutory scheme. Additionally, the legislative history of RSA chapter 362-C (Supp. 1990) provides no indication that the legislature intended any standard other than the statutory "just and reasonable" standard to apply. Therefore, RSA 362-C:3 (Supp. 1990) required the PUC to determine whether the rates under the rate plan met the

1-
statutory "just and reasonable" standard discussed in Appeal of Conservation Law Foundation.

Such an interpretation of the statute does not, as the majority suggests, contravene the legislature's apparent intent to expedite the resolution of the PSNH bankruptcy. The assumption underlying the majority's decision is that the legislature wanted to expedite the resolution of the PSNH bankruptcy by ensuring that the PUC would be able to approve and implement the agreement, including the rate plan, as quickly as possible. A close look at the plain language of RSA chapter 362-C (Supp. 1990) and its legislative history, however, reveal this assumption to be unfounded.

When it enacted RSA chapter 362-C (supp. 1990), the legislature stated that the PUC "should be authorized to

determine . . . whether the rates for electric service to be established [under the rate plan contained in the agreement] . . . should be approved." RSA 362-C:1, IV (Supp. 1990) (emphasis added). The legislature clearly did not intend the PUC to rubberstamp the rate plan. If the legislature had wanted the rate plan to be approved, it simply could have enacted legislation approving the rate plan. It is well-established that the legislature has the authority to set utility rates. See Duquesne Light Co. v. Barasch 488 U.S. 299, 313 (1989); The Minnesota Rate Cases, 230 U.S. 352, 433 (1913) (stating that "[t]he rate-making power is a legislative power and necessarily implies a range of legislative discretion"). Thus, there was no reason for the legislature to delegate this authority to the PUC, unless it wanted the PUC to use its expertise to analyze the rate plan.

The PUC has expertise in determining whether rates are "just and reasonable," which it has obtained as a result of holding numerous ratemaking proceedings in accordance with the applicable ratemaking statutes. By delegating the authority to approve the rate plan to the PUC without any further instructions, it follows that the legislature intended the PUC to conduct its customary analysis of the rates under the rate plan, whereby it would determine whether the rates met the statutory "just and reasonable" standard. This reading of the statute is consistent with the legislative history of RSA chapter 362-C (Supp. 1990): "[t]his bill authorizes the PUC to conduct a full and complete review of the rate agreement In other words, it delegates to the PUC the authority to perform an expert review of the technical terms of the Agreement." N.H.H.R. Jour. 8

(Special Session, December 14, 1989)
(emphasis added).

The legislature desired a prompt resolution of the PSNH bankruptcy, but it desired more. It also wanted to ensure that the rate plan would not unduly burden its ratepayer constituents. A prompt resolution of the PSNH bankruptcy and a careful review of the rate plan in accordance with traditional ratemaking principles were not, however, mutually exclusive goals. Moreover, the enormity of the undertaking involved in this case, namely, the decision whether or not to implement a rate plan calling for seven years of rate increases, warranted a conservative approach in determining the fairness of the rate plan, rather than the conclusory treatment engaged in by the PUC. The legislature had sound reason to expect the former; otherwise, it could have adopted the rate plan by

statute and shunted the PUC from any participation in this process.

II. The Reasonableness of Rates Must Be Assessed in the Context of the Ratemaking Process

Principles of federal constitutional law also required the PUC to assess the reasonableness of the rates under the rate plan in the context of the ratemaking process. The establishment of "just and reasonable" rates involves a balancing of investor and ratepayer interests, Power Comm'n v. Hope Gas Co., 320 U.S. 591, 603 (1944) which occurs when rates are determined in accordance with the traditional ratemaking principles, see Appeal of Conservation Law Foundation, 127 N.H. at 633, 507 A.2d at 671 (stating that the traditional ratemaking process "appropriately balances the competing interests of ratepayers who desire the lowest possible

rates and investors who desire rates that are higher"). By determining a proper rate base value and by allowing a reasonable rate of return on that rate base, the PUC ensures that ratepayers do not pay excessive rates and, in addition, guarantees investors an adequate return on their investment. "[W]hether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular ratesetting system, and on the amount of capital upon which the investors are entitled to earn that return." Duquesne, 488 U.S. at 310.

Although the United States Supreme Court has often stated that there is no constitutionally required ratemaking methodology or formula, Duquesne, 488 U.S. at 316; Colorado Interstate Co. v. Comm'n, 324 U.S. 581, 6045 (1945); Hope,

320 U.S. at 602, it must be remembered that in these cases the applicability of the traditional ratemaking process itself was not at issue, but rather some specific aspect of the ratemaking process, for example, rate base. See Duquesne, 488 U.S. at 301-02; Colorado Interstate Co. v. Comm'n 324 U.S. at 604-05; Hope, 320 U.S. at 603; see also Wisconsin v. Fed. Power Comm'n, 373 U.S. 294, 308-10 (1963) (holding that establishing rates on an area-wide, as opposed to an individual company basis is not unconstitutional); Power Comm'n v. Pipeline Co., 315 U.S. 575 (1942) (upholding the Federal Power Commission's findings as to rate base, amortization period, amortization interest rate, and rate of return). By stating that there is no single ratemaking formula, the Court apparently meant that there was no required formula for determining any of

the three variables used in the traditional ratemaking process, such as rate base. Accord Appeal of Conservation Law Foundation, 127 N.H. at 637, 507 A.2d at 673 (citing cases). Its holdings should not be read as broadly as the majority suggests, to stand for the proposition that rates may be found to be "just and reasonable," in the constitutional sense of the phrase, without reference to the traditional ratemaking process. In this instance, "traditional ratemaking process" refers to the general ratemaking process, whereby rates are determined in relation to the proper rate base and rate of return. This process may be expressed as the following formula: $R + O + (B \times r)$; but use of this specific formula is not necessarily required. See id. at 633, 507 A.2d at 671. What is required is that, in determining whether rates are

"just and reasonable," a utilities commission consider the proper rate base and rate of return, which in this case the PUC failed to do.

In Appeal of Conservation Law Foundation, this court noted that any attempt to determine the reasonableness of rates apart from the general ratemaking process described in that case would entail the risk of unconstitutionality. 127 N. H. at 639, 507 A.2d at 675.

"This is so, not because the State or Federal Constitution guarantees a particular rate, but because existing concepts of the constitutional limits of ratemaking have been developed in the context of a process that does not determine how far to recognize one competing interest in isolation from the other. That process has been described metaphorically as a "constitutional calculus" in which the interests of investors, like the interests of customers, are variables. Consequently, any criterion of reasonableness that might be applied independently from the balancing process that

does reflect such interests would run the risk of unconstitutionality by inviting the fixing of rates without regard to the balancing of interests."

Id. (citations omitted). Similarly, in Company v. State, 95 N.H. 353, 64 A.2d 9 (1949), we stated that

"in the Hope case, as in subsequent decisions called to our attention, the findings of the regulatory body whose orders were sustained disclosed a rational process by which a rate base and a rate of return were determined and applied, to produce the return translated into rates, or in default thereof, the case was remanded for further findings."

Id. at 357, 64 A.2d at 14. Reading the above-cited cases in a consistent manner, they teach us that, although there is no constitutionally required formula for determining rate base, or the other variables used in traditional ratemaking methodology, rates cannot pass constitutional muster unless they have been determined in relation to the proper

rate base and rate of return, or in other words, in accordance with the traditional ratemaking process.

III. The PUC's Analysis of the Rate Plan

In the present case, the comparison made by the PUC between the rates under the rate plan and the estimated traditional ratemaking methodology. Instead of determining the applicable rate base by calculating the value of PSNH's prudent investment in property used and useful in the generation of electricity, the PUC assumed the applicable rate base to be \$2.3 billion, NU's acquisition cost of PSNH contained in the agreement. Re Northeast Utilities/Public Service Company of New Hampshire, 114 PUR4th 385, 410 (N.H.P.U.C. 1990). It did so in spite of its previous decision in Re Public Service Co. of New Hampshire, 66 PUR4th 349 (N.H.P.U.C. 1985), in which it stated

that

"[r]easonable rates on a just and reasonable rate base cannot be finally prescribed without a prudency determination of the capital investment in rate base.

. . . .

We cannot prejudge the reasonableness of rates or make a definitive finding that rates resulting from the capital investment in Seabrook are unduly burdensome without first finding the prudent investment to which they relate We are bound by the New Hampshire and federal Constitutions to assure that ultimately PSNH will receive just compensation through rates on prudent investment. While there are constitutional guarantees of the opportunity to earn a fair return, rates may not be 'prohibitive, exorbitant, or unduly burdensome to the public.' The essential reconciliation of prudent investment and reasonable, not unduly burdensome rates may be accomplished in a rate proceeding when PSNH seeks rate support for the addition of Seabrook to its rate base. A prudency investigation should be initiated by the commission on a timely basis to assure an in-depth analysis of prudent investment and the reasonable rate level for a fair return to investors without unduly burdening ratepayers."

Id. at 424 (emphasis added) (citations omitted) (quoting S.W.Tel. Co.v. Publ. Serv. Comm., 262 U.S. 276, 290 n.2 (1923) (Brandeis, J.,dissenting)).

The PUC arrived at this \$2.3 billion figure by finding the value of Seabrook to be \$700 million and the value of PSNH's non-Seabrook assets to be \$800 million. The remaining \$800 million was labeled as an "acquisition premium." It does not appear, however, that the \$800 million "acquisition premium" represents the value of any particular utility property, so as to be properly included in rate base. See Re Northeast Utilities, 114 PUR4th at 467-68 (the PUC's rulings on Hydro Intervenors' requested findings numbers 3 and 7). The \$800 million acquisition premium does not legitimately bridge the gap between the value of PSNH's assets and the price to be paid for PSNH by NU, and is of

little solace to a ratepayer who is forced to contribute to a return on that asset which presumably does not generate electricity but merely helps to indemnify junk bondholders. See Appeal of Conservation Law Foundation, 127 N.H. at 650-51, 507 A.2d at 682-83 (King, C.J., and Batchelder, J., dissenting).

Since the PUC did not calculate the applicable rate base value, it was unable to properly determine the rates likely under traditional ratemaking methodology and compare them to the rates that will be produced by the rate plan. Therefore, the PUC erred in approving the rate plan, because it did not properly determine whether the rates that would be established by the rate plan are "just and reasonable."

IV. Conclusion

In this case, the legislature contemplated, and ratepayers and

investors alike were entitled to, a careful and thorough review of the rate plan by the PUC in accordance with traditional ratemaking principles. Yet the PUC, instead of determining whether the rates that New Hampshire ratepayers will be charged under the rate plan are "just and reasonable," focused its inquiry upon whether the "rate plan yields the minimum rates necessary to finance the payment of the \$2.3 billion bankruptcy compromise to PSNH creditors and equity holders without unduly burdening ratepayers or the N.H. economy." Re Northeast Utilities, 114 PUR4th at 405. Although the PUC cited Appeal of Conservation Law Foundation in its decision, apparently it did not fully comprehend the requirements this case imposes. As a result of its cursory analysis of the rate plan, ratepayers may now be unjustly locked into a rate plan

which not only provides for seven consecutive years of rate increases totaling, on a cumulative basis, approximately forty-five percent, Re Northeast Utilities, 114 PUR4th at 410, but which contains a return on equity "collar" and "ceiling" which allow for further increases, id. at 418.

The PUC, which five short years ago refused to consider the potential effect of a PSNH bankruptcy, see Appeal of Conservation Law Foundation, 127 N.H. at 670, 507 A. 2d at 695-96 (King, C.J., and Batchelder, J., dissenting), in authorizing the further borrowing of hundreds of millions of dollars for the completion of Seabrook Unit I at its then projected completion cost of \$4.7 billion dollars, id. at 648-49, 507 A.2d at 681, has once again fallen short of the mark which the New Hampshire Legislature and ratepayers should

reasonably expect of its in the performance of its high constitutional duty. It has found a schedule of rate increases to be in the public good without determining in the first instance whether they are "just and reasonable" as that term has been used by this court, the United States Supreme Court, the New Hampshire Legislature, and its own decisions.

The decision of the court today jeopardizes New Hampshire ratepayers' interest in receiving adequate utility service at a fair cost, because it results in the establishment of a schedule of electric rates that must be borne by ratepayers over a period of years without an oft-promised prudence hearing concerning PSNH's investment in Seabrook, see Re Public Service Co. of New Hampshire, 66 PUR4th at 424, which now exceeds \$6.5 billion, Re Northeast

Utilities, 114 PUR4th at 392 (as of January 1, 1990, the total cost of Seabrook, including all direct costs and interest charges, was approximately \$6.5 billion). For the reasons set forth herein, we would remand this matter to the PUC for its appropriate inquiry, and accordingly, we respectfully dissent from today's per curiam opinion of the court.

APPENDIX B

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 90-406, Appeal of Robert C. Richards, Edward Kaufman & a. the court upon June 5, 1991 made the following order:

Motions for rehearing filed by Richards, Kaufman and Rochman and by Campaign for Ratepayers Rights and Hilberg are denied. Brock, C.J. . and Batchelder, J. . would grant the motion of Campaign for Ratepayers Rights and Hilberg.

Distribution:

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Robert Richards
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Howard M. Moffett, Esquire
Robert J. Murphy, Ex. Sec.

File

Ralph H. Wood,
Clerk



91-200

(2)

Supreme Court, U.S.
FILED

AUG 2 1931

OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1931

ROBERT C. RICHARDS, EDWARD KAUFMAN AND
MARTIN ROCHMAN

Petitioners

- v. -

THE STATE OF NEW HAMPSHIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI
VOLUME II: APPENDICES C TO J

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APPENDIX C

DR 89-244
IN THE MATTER OF
NORTHEAST UTILITIES/
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
Reorganization Proceedings
BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

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NORTHEAST UTILITIES/
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Appearances: As previously noted

I. PROCEDURAL HISTORY

A. BACKGROUND

This proceeding was initiated by the commission on December 22, 1989 pursuant to a mandate of the N.H. Legislature embodied in RSA 362-C. In that statute the Legislature directed the commission to determine generally, whether the acquisition of Public Service Company of New Hampshire (PSNH) by Northeast (NU) would be consistent with the public good, and specifically, whether the proposed agreement¹ between the State of New

¹"Agreement" means the agreement dated as of November 22, 1989, as amended through December 14, 1989, executed by and between the governor and attorney general of the State of New Hampshire, and Northeast Utilities Service Company, acting on behalf of its parent Northeast

Hampshire (State) and NU relating to the reorganization of PSNH would be consistent with the public good and whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved. This agreement and the authorizing legislation were developments in a series of efforts to restore PSNH to financial health and ensure the adequacy, reliability and cost of electric service in New Hampshire. Uncertainties have clouded PSNH's financial health and ability to provide electric service since the liquidity crisis of March 1984 when, reacting to revised estimates for the completion of the Seabrook Nuclear Power Plant (Seabrook), a group of banks announced that they were unwilling to make advances

Utilities. RSA 362-C:2 II.

under the terms of PSNH's revolving credit agreement. As a result, PSNH was unable to meet its payments for the costs at Seabrook and suspended construction in April 1984. In response, the Joint Owners entered into a number of agreements, including the establishment of an Executive Committee to oversee the construction budget, and on June 23, 1984 resolved to resume construction of Seabrook Unit I and initiate a phased transfer of construction and operation responsibilities from PSNH to an independent entity. The latter was never accomplished and construction, and thus far operation, have remained the responsibility of the New Hampshire Yankee Division (NHY) of PSNH whose management reports dually to PSNH and to the Joint Owners.

Meanwhile, PSNH instituted severe cash conservation measures and proposed a

three phase financing plan intended to insure the availability of all funding necessary to complete Seabrook Unit I. In the first phase, PSNH sought and received authority to issue \$90,000,000 of short term debt. Docket DF 84-121, orders no. 17,057 (69 N.H.Puc 275) and no. 17,076 (69 N.H.Puc 326). In the second phase, the commission authorized PSNH to raise \$425,000,000 through the issuance of debentures and of warrants to purchase shares of stock. Docket DF 84-167, orders no. 17,222 (69 N.H.Puc 522) and no. 17,228 (69 N.H.Puc 558). This second phase financing was intended to enable PSNH to meet all general corporate purposes until the end of 1986 with the exception of Seabrook construction financing. The then anticipated commercial operation date of Seabrook Unit I was between May and August 1986.

The third phase of the financing,

referred to as the "Newbrook Plan" by PSNH, was considered in DF 84-200 which the commission opened on August 2, 1984 for the purpose of investigating whether pre-financing the completion of the construction of Seabrook Unit I was in the public good pursuant to RSA 369:1 et seq. In this docket, the commission reviewed the terms, conditions and the amount of the third phase financing, the cost to complete and alternatives to the completion of Seabrook Unit I and whether it was financially feasible for PSNH to engage in its proposed construction plan including an evaluation of the level of revenues needed to support the resulting capital structure.

The N>H> Supreme Court considered an appeal from the commission's approval of the first phase of the financing in Appeal of Seacoast Anti-Pollution League, 126 N.H. 789, 497 A.2d 847 (1985), and of

the second phase in both Appeal of Seacoast Anti-Pollution League, 125 N.H. 465, 482 A. 2d. 509 (1984) and in Appeal of Seacoast Anti-Pollution League, 125 N.H. 708, 490 A.2d 1329 (1984) and affirmed the orders of the commission.

On April 18, 1985 the commission issued its report and order conditionally approving the third phase of the PSNH financing and authorizing PSNH to issue and sell deferred interest bonds or tax exempt pollution control revenue bonds in amounts up to a total of \$525 million. Remanded by the N.H. Supreme Court, on November 8, 1985 the commission issued its 15th supplemental order no. 17,939 setting forth the reasonable and probable range of retail rates to assure PSNH a lawful return on investment in Seabrook Unit I. 70 NHPUC 886. The N.H. Supreme Court affirmed the orders of the commission in Appeal of Conservation Law

On May 29, 1986, PSNH filed with the commission Tariff No. 30-Electricity, which was designed to increase non-energy revenues by approximately \$58.9 million. In addition, the petition proposed a step increase in annual revenues of approximately \$35 million which was to become effective on year after the effective date of the initial increase. On June 29, 1987, the commission granted PSNH an increase of \$20,490,899. Re Public Service company of New Hampshire, 72 NH PUC 237, DR 86-122. Most of the difference between the petition and the commission's findings is attributable to the disparity between PSNH's request for a 19% return on equity, which it asserted represented the appropriate return for the common equity of a company as risky as PSNH, and the commission's finding of

15%. The commission's order was based in part on staff testimony that PSNH was so risky that from an investor perspective, its stock was a speculative investment and that "profits such as are realized or anticipated in. . . speculative ventures" offend the judicial standard as enunciated in Bluefield Water Works & Imp. co. v. Public Service Comm. of West Virginia, 262 U.S. 679, 692-693 (1923). PSNH appealed the commission's order, and nearly simultaneously petitioned the commission to alter existing rates on account of emergency circumstances. It requested an emergency rate surcharge of approximately \$70.98 million in additional revenues, an increase of 15%. In order to expedite consideration and determination of this request, PSNH asked that the commission reserve, certify, and transfer to the N.H. Supreme Court the question of whether a utility that has

insufficient cash from internal sources and was unable to attract external capital to meet the requirements of its business and otherwise support its financial integrity, was entitled to rates that would restore its financial integrity consistent with the interests of customers, notwithstanding RSA 378:30a, the so-called anti-CWIP statute. On September 2, 1987, the court deferred acceptance of the transferred questions until the commission had addressed two issues with finding of basic fact: the claimed need to include some of the Seabrook Unit I investment in rate base in order to make interest payments and expand services to customers, and the dates and amounts of PSNH's investments in Seabrook. The commission submitted to the court a record reflecting findings of fact on both issues on October 16, 1987. Report and sixth supplemental order no.

18,873, 72 NH PUC 485 (October 14, 1987). In respect to the claimed need for relief, the commission found that it was unlikely that PSNH would be able to meet its obligations from either external financing or current rates, even assuming that its appeal of order no 18,726 in DR 86-122 were successful. It further found that adjustment of any of the variables of the traditional ratemaking formula designed to provide the requested relief would also be in violation of RSA 378:30-a. On January 26, 1988, the court found that the anti-CWIP statute was constitutional and that the commission was not authorized to ignore the restriction imposed by RSA 378:30-a when it determines that an emergency exists for a public utility. Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988). Subsequently, on August 5, 1988, the court also

affirmed the commission's DR 86-122 order. Appeal of Public Service co. of New Hampshire, 130 N.H. 748, 547 A2d 269 (1988), cert. denied.

B.PSNH BANKRUPTCY PROCEEDING

On January 28, 1988, PSNH filed a voluntary petition for reorganization under Chapter 11 of the United States Bankruptcy Code. In its Form 10K for 1989, PSNH summarized the reasons for its bankruptcy filing as follows, linking the bankruptcy directly to PSNH's investment in Seabrook:

The financial difficulties that led to the Company's bankruptcy were attributable to a combination of several factors: the magnitude of the Company's investment in the Seabrook Nuclear Generating Station Unit 1 ("Seabrook"), which represents more than half of the book value of the Company's assets on its financial statements; the delay in obtaining approval of the operation of Seabrook from the Nuclear Regulatory Commission ("NRC"); and the prohibition under New Hampshire law to the

realization by the Company of any cash income from or return on that investment until Seabrook provides service to customers (the so-called anti-CWIP statute).

Staff late filed Exhibit 20, 1989 Form 10K, p. 1.

PSNH had begun construction of an nuclear power plant at Seabrook, N.H. after receiving a siting certificate in 1974. The Seabrook Nuclear Power Plant was originally planned as a two-unit nuclear reactor plant with a projected total cost of approximately \$1.3 billion and with completion projected for Unit 1 in November 1979. On May 7, 1979, the N.H. Legislature enacted the "anti-CWIP" law (RSA 378:30a), prohibiting any recovery in rates for any costs expended by a utility for construction of a plant until the plant was in commercial operation. Partly as a consequence of the anti-CWIP statute, PSNH reduced its

original 50% investment in the proposed plant to 35.6% in the early 1980-'s. By October 1986, only one unit had been completed. The cost of Seabrook including all direct costs and interest charges as of January 1, 1990 had escalated to approximately \$6.5 billion due to delays in receiving a commercial operating license from the NRC and the delays caused by the Chapter 11 proceedings. Of that total investment, the amount invested by PSNH was estimated to be \$2.9 billion as of January 1, 1990. (Ex. NU 1-E, Disclosure Statement at 71)

During the pendency of the Chapter 11 Reorganization, PSNH has functioned as a debtor-in-possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code (Disclosure Statement at 17, Ex. NU 1-E), subject to the jurisdiction of this commission in the ordinary course of

business.

The State of New Hampshire has been actively involved in the bankruptcy case expressing the interest of the State in the assurance of an adequate source of electric power for residents at reasonable rates. (Par. 9, Bankruptcy Court General Findings of Fact and Conclusion of Law Re Plan Confirmation Issues Ex. NU 14 (hereinafter Findings)). It intervened in the bankruptcy case in hopes of achieving a satisfactory resolution on a consensual basis. It also, in May 1989, created the New Hampshire Energy Authority and empowered it to acquire the assets of PSNH, should that prove necessary to resolve the bankruptcy of PSNH, to avoid long term uncertainty concerning the adequacy, reliability and cost of electricity to prevent monopolistic abuses and to make available a governmental alternative to

restore the public trust by providing essential electric service to the public. RSA 362-B. the statute gave the State leverage to negotiate a favorable public utility alternative to a governmental takeover.

On June 22, 1988 the Court granted the State explicit party-in-interest status within the meaning of §1109 (b) of the Bankruptcy Code and authorized the State to intervene generally in the bankruptcy proceedings pursuant to Bankruptcy Rule 2018 (a). The State negotiated with the principal parties concerning the level of rates which the debtor may charge N.H. ratepayers after confirmation of a plan (Disclosure Statement at 19). Negotiations resulted in plans proposed by PSNH management, Northeast Utilities, the United Illuminating Company and the New England Electric System. (Findings, par. 7

Disclosure Statement at 23.)

On November 22, 1989, the Governor and the Attorney General, on behalf of the State of New Hampshire entered into an Agreement with NU intended to resolve the reorganization proceedings. The State also announce that it would enter into a similar agreement with any other party that could produce a plan that would resolve the bankruptcy; however, any alternative plan would require the support of the creditors and shareholders similar to the support accorded the NU plan at the time of the November 22, 1989 Agreement. In December 1989, PSNH management joined NU in support of its reorganization proposal. United Illuminating and New England Electric have withdrawn their plans.

The New Hampshire Legislature approved the Rate Plan on December 18, 1989, subject to NHPUC review and

implementation. HB1-FN. RSA 362-C. The Rate Plan, which suspends the Anti-CWIP Law for the PSNH Reorganization provides for seven annual 5.5% increments in the company's retail rates, commencing January 1, 1990. The first increase was implemented on December 28, 1989. DR 89-219, Report and Order No. 19,655. The amounts collected are currently being held in escrow by the New Hampshire State Treasurer, subject to final approval by the NHPUC.

The negotiations among the various parties in interest to this case with regard to various plan proposals of the parties culminated in the filing on December 28, 1989, of the Third Amended Disclosure Statement of Northeast Utilities Service Company in connection with the Third Amended Joint Plan of Reorganization of NU, PSNH, the Official Committee of Unsecured Creditors, the

Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities and Communications, Inc. and Shearson, Lehman Hutton, Inc. This Plan was the subject of the confirmation hearings before the U.S. Bankruptcy Court for the District of New Hampshire (In Re: Public Service Company of New Hampshire, Debtor Chapter 11 Case No. 88-00043).

On March 27, 1989 the Plan's proponents mailed a ballot, copies of the Court's notice, the Disclosure Statement, transmittal letter from William Ellis and John Duffett, the chief executive officers of Northeast Utilities and the Debtor respectively, and a return envelope for the ballot accepting or rejecting the Plan, to all creditors and all equity security holders of the Debtor of Record on November 27, 1989. (Findings, par. 19). The Plan was accepted in writing by the unsecured

creditors and equity holders. A majority of secured creditors have also accepted the Plan. On April 20, 1990, the Bankruptcy Court confirmed the Plan. Order BK No. 88-43. Upon the effective date of the Reorganization Plan (August 1, 1990 or such later date as may be agreed), NU will make approximately \$2.3 billion in cash and securities available for creditors and equity security holders. The effective date is contingent on NHPUC approval of the Rate Plan.

In accordance with the provisions of the Reorganization Plan, all directors of the company are deemed to have resigned on April 30, 1990. A new seven-member board (three members approved by the Equity Committee, three members by the Unsecured Creditors Committee, and one member jointly approved by both committees) took office. (Par. 19, order

confirming Third Amended Joint Plan of Reorganization)

A separate order of the Bankruptcy court, entered April 13, 1990, placed in effect a Management Services Agreement between the company and NUSCO as of April 30, 1990. The Bankruptcy Court found that the Management Services Agreement is fair, reasonable, consistent with public policy and the public interest and is in the best interests of creditors and security holders of the Debtor. (Par. 31 Bk No. 88-43 order).

The April 20, 1990 Confirmation Order also approved the merger agreement finding it to be fair, reasonable, consistent with public policy and the public interest, and made it binding on PSNH, NU, NUSCO and NU acquisition corporation without the need for further action by any other entity. In addition, the FERC approved the Management Services

Agreement, 50 Fed. Energy Reg. Comm. Rep. (CCN) @61,266 at 61, (1990). The SEC has not rejected the Management Services Agreement . SEC File No. 70-7695.

C. DR 89-244

The instant proceeding was opened by an order of notice on December 22, 1989 to consider the petition of Northeast Utilities Service Company (NUSCO) acting on behalf of its parent NU for Approval and Implementation of the Agreement Between the Governor and Attorney General of the State of New Hampshire and NUSCO. Larry M. Smukler, Esq., who was the State's chief negotiator for the Rate Agreement was confirmed Chairman of the N.H. Public Utilities commission on December 20, 1989. Subsequently John N. Nassikas was appointed Special Commissioner and Presiding Officer after Mr. Smukler recused himself from this proceeding.

The order of notice set a prehearing conference for January 10, 1990 at which the parties would address issues of scope, procedure, intervention and schedule, and granted full party status to all parties to DR 89-219, the Temporary Rate proceeding. At the procedural hearing, the State presented Stipulated Recommendations of the Parties regarding Scope, Procedure and Schedule. Subsequently, the parties presented more detailed recommendations regarding scope. ON January 19, 1990, the commission issued report and order no. 19, 674 granting all motions for intervention and limited intervention that had not been previously granted, adopting the recommendations of the parties regarding procedures and schedule, and setting forth the scope of the proceeding.

NUSCO's Petition also requested waivers of certain provisions of the

requirements of N.H.Admin. Rule Puc 1603.03 (the tariff filing requirements), arguing that certain information and materials were either not available to NUSCO or were not relevant due to the unique and special nature of this proceeding. The parties met on January 11, 1990 and on January 18, 1990 filed a document entitled "Stipulation on NUSCO's Requests for Waivers of Certain Filing Requirements". By report and order no. 19,673 the commission accepted the stipulation finding that the purpose of the commission's rules would be fulfilled by the information and data to be provided by NUSCO and PSNH in accordance with the Stipulation. Order no. 19,677 waived requirements regarding notice and ordered NUSCO to consult with the parties on the issuance of a bill insert describing and explaining to customers the Rate Agreement and Plan for

Reorganization of PSNH.

During the course of the proceeding, parties have filed petitions and the commission has issued orders in three areas: scope, discovery and late interventions. On January 25, 1990, John V. Hilberg (Hilberg) filed a motion requesting the commission to clarify and/or amend its order no. 19,674 regarding scope, and on February 20, 1990 filed a second motion requesting reconsideration. On February 8, 1990 the Office of the Consumer Advocate (OCA) also filed a motion requesting clarification or amendment of the order. On February 8, 1990, the Hydro Intervenors filed a motion for rehearing. The commission denied Hilberg's motion in report and order no. 19,703 finding that contrary to Hilberg's assertions, the standards for the commission's review must be the result of the ratemaking

process rather than a comparison with a set of alternative rates that would obtain in other circumstances, and that consideration of whether the Agreement and proposed rates represented a reasonable resolution of the PSNH bankruptcy did not entwine the commission with the judgments of the Bankruptcy Court as the roles of the Bankruptcy Court and the commission were separate and distinct. The commission denied Hilberg's second motion in order 19,726 on the grounds that it was untimely and alleged essentially the same assertions as his first motion.

In report and order 19,714, the commission clarified its order in response to the OCA to emphasize that it did not believe that it could find that the Plan of Reorganization would serve the public good independently of finding whether or not the rates required under

the Rate Agreement were just and reasonable, and to state that it was well aware of the "constitutional calculus" defined by the U.S. Supreme Court in Permian Basin Area Rate Cases, 390 U.S. at 769, cited at p. 639 of the Appeal of CLF, Op. Cit. and intended to apply it in balancing the interests of ratepayers and investors. The commission denied the motion of the Hydro-Intervenors in report and order 19,715, finding that the actual reduction of the rates in the long term rate orders of the small power producers was not an integral part of the Rate Plan and consideration of that issue could be appropriately deferred until there was a issue before the commission requiring resolution.

Second, the commission has responded to a series of motions regarding problems of discovery. In response to motions filed by staff and PSNH, the commission

by order no. 19,727 amended the procedural schedule to allow additional time for the completion of discovery. The OCA filed a motion to compel responses to data requests on March 1, 1990, but withdrew it on March 8th. Order no. 19,736 and order no. 19,742 granted requests by staff, NUSCO, and PSNH for protective orders for confidential, commercial or financial information. In response to objections to these orders by the Hydro and the Biomass Intervenors and SES Concord, the commission issued order no. 19,767 requiring NUSCO and PSNH to file comments on whether counsel of those intervening parties should be permitted to review the studies covered by the protective orders. When NUSCO and PSNH, the only parties that could be prejudiced by wider review of the studies, stated that they did not object to the relief requested by the

Hydro and the Bio-mass Intervenors and SES Concord, the commission granted the motions for reconsideration by order no. 19,781.

By order no. 19,812, the commission granted the motion of PSNH for a protective order to afford proprietary treatment to a list of employees who were to be terminated from PSNH in conjunction with the newly assumed NU management of PSNH. Order no. 19,829 granted a motion by NU for a protective order regarding the Seabrook budget study information on the grounds that premature public dissemination and disclosure of the information could adversely affect the morale of NHY employees thereby impairing NHY's ability to bring Seabrook to commercial operation. On May 22, 1990, the commission by order 19,834 denied the motion by the Hydro Intervenors requesting that NU provide financial

forecasts using NU's financial model and output formats but incorporating alternate assumptions proposed by the Hydro Intervenors and other related information. The commission found that provision of the information requested would be unduly burdensome to produce, would be of minimal value, was untimely and would disrupt the orderly proceeding of the docket.

Third, the commission dealt with several instances of late intervention. On April 9, 1990, the commission granted from the bench a motion to intervene by the New Hampshire Electric Cooperative, Inc. (NHEC). On May 2, 1990, by order no. 19,811 it made the New Hampshire Yankee Division of PSNH, the managing agent for the construction and operation of the Seabrook Nuclear Power Plant, a mandatory party to the proceedings so far as its interests may appear.

Finally, dissident stockholder Robert C. Richards (Richards) filed motions to intervene out of time on April 25 and 26, 1990, and petitions for intervention on behalf of Martin Rochman and Edward Kaufman (Rochman and Kaufman) on May 7, 1990. The stated purpose of these interventions was to challenge the constitutionality of RSA 362-C and the rates that may be established pursuant thereto. The Official Committee of Equity Security Holders of PSNH, PSNH, NU, the State and the BIA opposed the interventions. The commission denied the untimely petitions, and Richards' motion for rehearing of May 11th, finding that the interventions will not serve the interests of justice and will impair the orderly and prompt conduct of the proceedings. Report and orders no. 19,814, no. 19,830 and no. 19,831. On May 16, 1990, Richards filed a petition

with the N.H. Supreme Court on behalf of himself, Kaufman and Rochman for a Writ of Prohibition to the New Hampshire Public Utilities Commission. On June 18, 1990, the N.H. Supreme Court denied the petition for writ of prohibition without prejudice.

Hearings on the merits were held between April 9 and May 5, 1990, and hearings on rebuttal and supplemental testimony were held on May 22 through 25, 1990. There were 21 hearing days. Parties filed briefs on June 8, 1990. The commission granted requests by the State, the BIA and Hilberg for extensions until June 18, 1990 for the filing of their trial briefs.

On June 6, 1990, Counsel for NU filed, per its agreement with the State and staff, an opinion to the effect that the waiver of rights of set-off under Section 6 of the Seabrook contract will

not preclude PSNH as buyer under the contract from pursuing all rights and damages arising from the Seabrook contract.

On June 8, 1990 the Hydro Intervenor also filed a motion for rehearing on their request for further discovery. On June 21, 1990, the commission denied the motion by order no. 19,859, on the grounds that the alternatives proposed by the Hydro Intervenor could result in substantial changes to the Rate Agreement, that the commission clearly established within its previous scoping orders in this docket that it will apply applicable law in determining whether or not the proposed rates are just and reasonable, that the requested information would have minimal probative value, and that the Hydro Intervenor had presented no factual or legal arguments that had not been already

considered by the commission prior to its issuance of order no. 19,834

On June 22, 1990, NU and the State filed joint recommendations appended to this report.

II. POSITIONS OF THE PARTIES

A. NORTHEAST UTILITIES

NU avers that the rates under the Rate Agreement are just and reasonable under all the standards identified in the commission's scoping order. The rates under the Rate Agreement are likely to be more favorable than rates that could be foreseen under traditional ratemaking whether PSNH becomes an affiliate of NU or remains a stand-alone company. It argues that the Rate Agreement fairly balances the interests of PSNH investors and ratepayers, in that the rates are the minimum reasonably required to raise amounts necessary to satisfy PSNH's creditors and equity holders while not

unduly burdening ratepayers or the New Hampshire economy. Under the Plan, by the end of the ten year period, real rates are projected to be lower in New Hampshire than they are today. The rates will be competitive with those expected for other New England utilities, close to the expected price of electricity of other NU subsidiaries, only slightly higher than those forecasted for the New England region, and substantially lower than those forecasted for United Illuminating, the second largest owner of Seabrook. NU notes that there is not other alternative plan of reorganization to which rates under the Rate Plan can be compared.

Nu contends that the Acquisition Premium is in the public interest. It is a regulatory asset created by the Rate Agreement, representing the portion of NU's investment after subtracting the

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value assigned to Seabrook and the book value of PSNH's non-Seabrook assets. The concept was developed so that PSNH could use certain tax benefits more effectively and apply an asset amortization schedule tailored to the specific financial demands and rate recovery limits imposed on the reorganized PSNH. Thus, it serves the overall goal of achieving a viable balance between the creditors' and shareholder's demands for prompt recovery of their investment and the ratepayers' interest in minimizing rate increases. NU argues that the exclusive interest of the Hydro Intervenors in this proceeding is in recharacterizing the Acquisition Premium to make Seabrook power as expensive as possible, regardless of how such changes affect ratepayers. NU believes that since the accounting treatments of various PSNH assets under the Rate Agreement further the interests

of New Hampshire ratepayers and conform with Generally Accepted Accounting Principles, the commission should reject any attempts to undermine those accounting treatments to further the interests of the Hydro Intervenors.

NU avers that the Fuel and Purchased Power Adjustment Clause (FPPAC) fairly balances the interests of investors and ratepayers. FPPAC is based on traditional ratemaking principles, including ongoing prudence review of the cost components. Its purpose is identical to that of PSNH's current Energy Cost Recovery Mechanism (ECRM) in that it provides for periodic and consistent adjustment of electric rates to reflect certain of PSNH's costs. It is also designed to reflect the unique agreement by PSNH to fix base rate increases for seven years without regard to inflation or fluctuation of sales and

operation and maintenance (O&M) expenses not related to fuel costs. The basic difference between FPPAC and ECRM is that FPPAC provides for the recovery of long-term purchased capacity costs, including those under the Seabrook Power Contract, in addition to fuel and energy costs. NU notes that the issues that have been raised concerning FPPAC revolve around the assumptions in establishing PSNH's fuel and purchased power cost projections rather than the design of the mechanism. NU argues that the assumptions underlying the FPPAC "BA", FPPAC's baseline fuel and purchased power expense projections, are balanced and reasonable and characterizes them as a set of individually reasonable assumptions that, in the aggregate, were likely to balance each other over the life of FPPAC and under various factual circumstances, including fossil fuel prices, regulatory changes, Seabrook O&M

and performance variations and changes in the market cost for capacity. NU accepts the inclusion of interest and a trigger mechanism in FPPAC as proposed by staff, but argues that incorporating a Seabrook performance mechanism would substantially alter a fundamental term of the Rate Agreement and would be inherently unfair to PSNH because better than anticipated performance would provide no benefit to PSNH if it resulted in the return on equity (ROE) exceeding the equity collar (13.25%) to balance the potential loss if performance were worse than anticipated. NU also contends that such a condition might jeopardize the reorganization financing and the Nuclear Regulatory Commission (NRC) approval of NU becoming managing agent for Seabrook, and is not needed because NU has an incentive to contain costs in order not to lose customers to self-generation.

On other issues regarding FPPAC, NU avers that it has satisfied the concerns raised by staff-about the capacity and energy costs to PSNH ratepayers of NU's off-system capacity sales.- It notes that neither the renegotiation of the NHEC buy-back of Seabrook capacity or of the power purchase arrangements with certain small power producers (SPPs) need be an immediate concern as Rate Agreement may be reopened to address the buy-back arrangements, and renegotiations of the SPP power purchase arrangements can serve only to reduce rates.

NU avers that the Seabrook Power Contract, designed to minimize financing costs and ensure the safe operation of Seabrook is in the public interest. While PSNH's obligation to North Atlantic Energy Corporation (NAEC) are essentially unconditional, ratepayer' obligations to PSNH are not; NU and NAEC's waiver of any

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provision of law that would preclude commission review of prudence of Seabrook costs will last as long as the payments under the Seabrook Power Contract are treated in a manner similar to their treatment under FPPAC. Nu agrees that nothing in the Contract would foreclose any cause of action that PSNH would otherwise have against NAEC or diminishes existing commission powers with respect to replacement power costs. NU also notes that the Seabrook Power Contract avoids rate shock by incorporating a qualified phase-in plan for PSNH's Seabrook investment and that the Seabrook cancellation recovery provision is at least as favorable as any likely outcome under traditional ratemaking.

NU contends that the Investment Adder, defined as "the capitalized synergies, efficiencies or other cost savings or benefits brought by NU to the

acquisition of PSNH" (Ex. NU i-E at (D-85-86), is justified by the synergies, which it calculates to exceed \$515 million (PSNH's share of Seabrook O&M expenses at \$188 million, the fossil steam unit availability estimated from three years of actual data and two years of projected data at \$98 million, the NEPOOL related synergies at \$146 million, and the Administrative and General (A&G) expense and coal purchasing synergies at \$86 million). NU argues that the NEPOOL synergies are not at risk of other members eliminating the savings by modifying the NEPOOL Agreement because such changes pertain to some of the most basic energy and capacity allocation formulas in the NEPOOL Agreement and are therefore not likely to attain the necessary consensus among NEPOOL members. NU argues that under the Rate Agreement the commission cannot revisit the

quantification of the synergies to adjust the Investment Adder after the merger but retains its authority to examine the reasonableness of the O&M costs incurred by PSNH after the affiliation. NU expects only to recover prudently incurred costs, but cannot offer to be a guarantor of the projected synergies.

NU argues that the ROE Collar fully protects ratepayers from PSNH receiving excessive returns in that it caps PSNH's cumulative net present value return on equity (CUM NPV ROE) during the fixed rate period at 13.25% based on NU's \$2.3 billion investment in PSNH. It states that the Collar provides only limited protection for investors as the same calculation for the floor is actually a 2.8% ROE.

NU contends that the Base Rate modifications authorized under Section 5(a) (v) (A) of the Rate Agreement (Ex. NU

1-E at D-14-16) are reasonable and necessary. This section allows for adjustments for legislative or regulatory changes which require capital expenditures of at least \$20 million (or an increase of annual expense of at least \$2 million), changes in the required payments to the Nuclear Decommissioning Fund, funding for mandates by legislative or regulatory authorities, recovery of costs of conservation and load management (C&LM) programs undertaken with commission approval and changes to the accounting standards. It notes that it is undisputed that the definition of the term "costs" includes ¹direct program costs, and that the issue of whether it also includes lost revenues and incentives will be resolved in docket DR 89-187. Therefore, NU requests that they commission define the term "costs" in this docket consistent with its findings

in DR 89-187. NU has clarified that this section did not intend to permit double recovery for the same expenses in both base rates and FPPAC, has agreed that it was not the intent of the Rate Agreement that either PSNH or ratepayers should be disadvantaged by PSNH's pursuit of least cost planning measures, and has adopted the proposal that additional revenues obtained from the 5.5% compounding effect of reimbursing PSNH for C&LM expenses through base rate increases will be spent on additional C&LM efforts.

NU states that the Rate Agreement provides substantial non-rate benefits to ratepayers and the State of New Hampshire which are further reasons to determine that its implementation is consistent with the public good. These benefits include the strength of NU management, the application of NU's expertise to foster the safe and economical operation

of Seabrook, assured capacity resources over the next two decades at embedded cost and the establishment of financially viable electric utilities (PSNH and NAEC) to serve New Hampshire reliably and without substantial risk of another bankruptcy. The viability is indicated by the financial ratios, the evidence that the reorganization financing will be successful and the reasonableness of NU's sales forecasts.

NU presented comprehensive testimony relating to the terms and conditions of the first step financings required to finance the \$2.3 billion reorganization plan confirmed by the Bankruptcy Court. NU is not seeking approval at this time of second step financing.

Finally, NU argues that it is not necessary for the commission to condition — its finding that the Rate Agreement is in the public good with a requirement that

the merger take place. NU first argues that mutual termination, a breach by either PSNH or NUSCO of the Merger Agreement, or the emergence of a new suitor are all unlikely events. It notes that the evidence of the financial ratios indicates that while Stand-alone PSNH would initially be an unattractive investment, it would be financially viable and would improve over time. If Seabrook failed to achieve commercial operation or were canceled, Stand-alone PSNH would still be able to service its debt and preferred stock, finance necessary construction expenditures and remain viable over time. NU notes that NUSCO will be obligated to provide management services to reorganize PSNH for six months after the termination of the Merger Agreement and assist with the transition, and must continue to provide management services for Seabrook

(assuming that NRC and Joint Owner approval have been received) for up to five years. while there will be impacts on rates if the NU synergies are not achievable by Stand-alone PSNH, savings like the A&G, coal purchasing, fossil steam unit availability improvements and Seabrook operating efficiencies could continue to accrue to PSNH as a result of the lessons learned during NU's management. Even acknowledging the increase in rates compared to the merged PSNH, NU argues that the fundamental issue is whether New Hampshire ratepayers would be better off facing such increases under the Rate Agreement or the return of PSNH to the uncertainties of the Bankruptcy Court. In addition to its arguments that an unconditioned approval is justified by the evidence, NU also argues that a finding of public good conditioned on the merger would make it

impossible to finance the step one reorganization and therefore would preclude the timely resolution of the bankruptcy.

NU concludes by requesting the commission to make the ancillary findings regarding the financings, the affiliate contracts and the structural changes required by the Joint Plan.

B. PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE

PSNH stated that it joined in and supported the Brief and Requests for Findings and Approvals filed by NU in this proceeding.

In a letter dated June 15, 1990, PSNH responded to two points raised by the OCA to clarify its position. It argues that as there has been no disallowance for Schiller outage costs and the docket concerning those costs has been closed, that issue is not

appropriately within the scope of these proceedings. In regard to the OCA recommendation that the commission finding that the Rate Agreement is in the public good be contingent on the merger, PSNH argues that such a condition would be a major substantive change in the terms of the Rate Agreement which was intended, among other things to prevent chaos in the event a merger failed to take place. It contends that such a condition was likely to make PSNH's Step 1 financing impossible, and that in the case of unilateral action by PSNH to prevent the merger, the commission would have continuing jurisdiction over PSNH under RSA 365:5 and RSA 374:1 to examine the prudence of any such action, especially if the commission had previously determined that the acquisition of PSNH by NU was in the public good.

C. NEW HAMPSHIRE YANKEE

NHY addressed the issue of the discrepancy between the estimates of NHY and NU regarding the cost of operating Seabrook. It concluded that with NHY as a stand-alone entity it was confident that the 1991 operation and maintenance costs at Seabrook would be \$157.5 million or less and accepted that NU believed that NU would be capable of operating Seabrook as part of a multi-unit organization for \$113 million or less. However, the differences in the two estimates could only be resolved by a jointly conducted, detailed analysis which could be reasonably initiated only after Seabrook had attained commercial operation.

D. STATE OF NEW HAMPSHIRE

The State of New Hampshire, by and through the Attorney General, stated that the record evidence indicates that the

rates required under the Rate Agreement are just and reasonable and that the NUSCO plan for reorganization will serve the public good. After setting forth the standard of reasonable rates by citing Appeal of Conservation Law Foundation op. cit., the State requests the following findings of fact based on the evidence it cites:

1. The resolution of the PSNH Bankruptcy is in the public good.

2. The Rate Agreement is fair, reasonable, consistent with public policy and the public interest, and is in the best interests of ratepayers and shareholders.

3. The Annotated Rate Agreement and accompanying glossary submitted by the State Ex. (AG2) are adopted as the authoritative reference guide to the Rate Agreement.

4. The rates proposed under the Agreement are just and reasonable, will serve the public good and effectuates a reasonable settlement of the PSNH bankruptcy.

5. The 5.5% annual rate increases for the first seven years will provide a fair rate of return to a financially viable PSNH/NU, based on the efficiencies stemming from the synergies included in the Rate Agreement.

6. The 5.5% rate track will produce a stable source of power and assurances to customers of known and measurable rates and rate increases.

7. PSNH as a reorganized stand-alone corporation will exist as a financially viable business entity.

8. The commission's traditional ratemaking authority resumes at the end of the seven year rate plan, at which point it can adjust rates as it deems appropriate.

9. The commission will have regulatory authority, although not ratemaking authority, over North Atlantic at the end of the seven year rate plan.

10. FPPAC is in the public good and its base assumptions and recovery mechanisms, as adjusted by the Second Joint Recommendation of the State and NU, are reasonable and just.

11. During the period of FPPAC's existence, PSNH and NAEC will be subject to prudence review by the commission of the recovery from

ratepayers of any and all payments made under the Seabrook Power Contract. Following the expiration of the FPPAC, the commission can establish whatever kind of fuel recovery mechanism it deems to be appropriate for PSNH at that time.

12. C&LM issues need not be resolved before the commission issues a final order regarding the Rate Agreement. Should the commission elect to reject the Joint Recommendation of the State and NU of June 22, 1990 on this point, the commission can deal with those issues in a subsequent proceeding.

13. The structure of the Rate Agreement, which incorporates an Acquisition Premium, is a benefit to ratepayers, particularly as it allows effective use of available tax credits and amortizes a large part of the Acquisition Premium, and therefore NU's acquisition price, within the fixed rate period. /

14. The Return on Equity collar is fair, just and reasonable, assuring ratepayers that investors do not earn unreasonably high returns and protecting investors with a minimum floor for their returns.

15. The rate arrangements between PSNH and the SPPs are not affected by the Rate Agreement and changes to them will require

separate proceedings.

16. The 20 year load and resource plan and the assumptions included in it are just and reasonable and provide adequate assurances that NUSCO will be able to supply the energy needs of New Hampshire customers at reasonable cost.

17. The capitalized values presented by the plan are not unduly burdensome to New Hampshire ratepayers.

18. There are not alternative reorganization plans being offered to the commission which will resolve the PSNH bankruptcy and will result in the same or lower costs and risks to the ratepayers and the State of New Hampshire.

19. NU has met its burden of proving that its underlying assumptions regarding the Rate Agreement and its financial forecasts are reasonable and that the 5.5% increases are achievable.

20. In approving the Rate Agreement, the commission is approving both a rate plan for reorganized PSNH and the merger of PSNH and NU, on terms and conditions established by the record in this docket. To the extent the terms and conditions are modified prior to the merger, these modifications would, by definition, present a merger

different from the one considered by the commission, and would require further review and approval by the commission before a merge could occur.

The State also noted that there was an outstanding issue regarding reimbursement of NU's bankruptcy fees and expenses. The State and NU were negotiating treatment of these items at the time the Requested Findings was filed and the State expected to achieve an agreement on the point by the end of the week of June 25, 1990. On July 12, 1990, the State filed a Supplemental Proposed Finding of Fact informing the commission that the parties had been unable to agree, and requesting the following finding of fact:

All fees, expenses and obligations incurred by Northeast Utilities in the resolution of the PSNH bankruptcy and proposed acquisition, whether paid or not, on or before the First Effective Date shall be included in the \$2.3 billion Capitalization ceiling of PSNH. All fees and

expenses paid by Northeast Utilities in furtherance of the merger of PSNH and NU between the First and the Second Effective Dates may be included in the Acquisition Premium, up to a total of \$45 million. All fees, expenses and obligations of NU attributable to the reorganization and merger of PSNH and NU shall be subject to review and determination by the Commission that they are just and reasonable.

E. OFFICE OF CONSUMER ADVOCATE

The statement of the position of the OCA is organized according to the Staff recommendations put forth in Staff Exhibit 1C. The OCA agrees with Staff that the issues of the parachute payments, the Schiller "disallowance" and NU's non-incremental expenses of the acquisition have receded in importance. However, the OCA states that to the extent that there is flexibility in the timing of the parachute payments, they should be made before the First Effective Date, and that prior to the First

Effective Date the commission should fine PSNH an amount equal to the Schiller disallowance. It stated that payments should be made toward the NU non-incremental expenses prior to the effective date if feasible, but that its concerns had been tempered by the provision that ratepayers will share in a number of benefits they would not ordinarily receive. The OCA is satisfied with the explanation that the Rate Agreement intended that the NHPUC retain prudence review of Seabrook costs as long as its purchased power costs are collected through a fuel type clause, but adds that it believes that the commission would retain this regulatory oversight even without such an agreement. Similarly, the OCA believes that the commission retains jurisdiction over replacement power costs in the event of negligence at Seabrook.

The OCA believes that NU has satisfactorily addressed the issues of the PSNH cause of action at law for damages against NAEC in the event of mismanagement at Seabrook by NUOP, of the flows of capacity revenues and costs through FPPAC, of FPPAC costs and revenues from off-system sales, of the formula for FPPAC, of the recoverability of discretionary capital expenditures for least cost planning measures of less than \$20 million through FPPAC, and of reporting requirements.

In contrast to staff, the OCA believes that the 25%/75% sharing of the load diversity synergy is reasonable in conjunction with New Hampshire's 50% share of the energy synergy. Also, from its perspective the issue of wholesale cost and revenues is not a major issue in this docket as the NHEC will be submitting a rate plan at which time the

parties can balance the interests of PSNH and the NHEC ratepayers. The OCA notes that it still has serious concerns that NU will not be able to attain all of the synergies it predicted, and recommends the implementation of a deferred banking mechanism to hold increases to 5.5% annually. On C&LM, it observes that increased sales growth tends ~~to~~ mitigate rate increases. Therefore, it cannot support C&LM unless a specific program is available for analysis, and that discussion on such specific programs should be deferred to a separate proceeding. Further, it argues that any program that attempts to shift revenue responsibility is "rate design" requiring legislative approval, and that the commission should find that the burden of the 5.5% base rate increases should be borne equally by all customer classes, and that the recovery of lost

revenues occurring because of C&LM programs would be double recovery since NU rather than ratepayers receives the benefit from all capacity sales.

Finally, the OCA contends that the commission should approve the Rate Agreement only in the event that PSNH merges with NU. It states that a Stand-alone PSNH operating under the Rate Agreement would exceed the 5.5% annual increases by approximately \$500 million because of the loss of NU synergies and therefore would be a viable alternative only if the value for Seabrook were significantly less than \$1.5 billion, a contingency that the OCA believes is at best speculative.

F. GRANITE STATE HYDROPOWER
ASSOCIATES, INC., PENACOOK HYDRO
ASSOCIATES, ERROL HYDROELECTRIC
LIMITED PARTNERSHIP, BRIAR HYDRO
ASSOCIATES, PEMBROKE HYDRO
ASSOCIATES, AND GREGG FALLS
HYDROELECTRIC ASSOCIATES (HYDRO
INTERVENORS)

The Hydro Intervenors argue that the commission's determination of the reasonableness of the proposed rates, including its calculation of the rate base component, must be based on some rational method. They state that New Hampshire's statutory basis for calculating rate base (RSA 378:27 & 28) is the original cost of the utility's "used and useful" property less accrued depreciation, and that RSA 362-C does not supersede those ratemaking principles. Specifically, they argue that no rational basis has been identified for the \$700 million cost assigned to Seabrook and the \$800 million Acquisition Premium was simply the residual after the Seabrook value was assigned. The Acquisition Premium can only be explained as additional Seabrook cost and therefore should be identified as such in a relatively straightforward manner. They

warn that the inclusion of such a large unassigned value would violate the requirements that rates be designed to produce a return on the company's investment in property and place the commission's order at risk of being reversed or remanded.

G. BIOMASS INTERVENORS

The Biomass Intervenors, while represented in the hearing room, did not present a witness, perform cross examination, file a brief or otherwise indicate a position on the issues currently before the commission.

H. BUSINESS AND INDUSTRY ASSOCIATION

The BIA notes that the protracted struggle to bring PSNH out of bankruptcy was the product of hard negotiations among all the affected interests in the state. Apart from the other standards which the commission must employ in determining whether to approve the Rate

Plan, the BIA contends that the commission should accept the collective judgement of the parties to this proceeding that the Plan represents the most fair and equitable resolution of the issues before it.

The BIA argues that by approving the Rate Plan as proposed in DR 89-244, the commission will provide ratepayers with rate certainty which has been absent for years and which will enable New Hampshire commercial and industrial customers to make strategic plans incorporating a known and predictable cost of electricity. In addition, the BIA cites their study of electricity prices for commercial and industrial customers as indicating that a significantly high proportion of those customers would respond to prices above those in the Rate Plan by reduced consumption or complete migration from the system, resulting in

substantial loss of load for PSNH. The effects of rate increases similar to those in the plan are not as adverse.

The BIA believes that the proposed rate plan meets all of the tests the commission should use. It provides revenues to NU which will assure that the utility providing electricity to New Hampshire ratepayers will remain a viable business entity, and competent management by NU which will assure the efficient and economical operation of Seabrook and economies of scale.

The BIA notes that the issue of C&LM recovery should be addressed in the commission's generic investigation, but appends its position in that case. Generally, the BIA believes that C&LM programs have not received adequate attention by New Hampshire utilities, and by PSNH in particular, and that such programs offer an effective means to help

ratepayers minimize the economic impacts of the proposed rate increases. However, the BIA believes that special attention should be paid to the impact of the design of C&LM programs on the need for additional revenues, and that therefore incentives are inappropriate. The BIA argues that if C&LM programs are cost effective they should be implemented as part of the utility's obligation to provide service in a manner that is least cost. A more appropriate strategy for promoting C&LM programs would be to develop an all source bidding approach, which the BIA prefers because it would not violate the rate cap and relies on the market to ensure that only the most cost effective programs are pursued. While believing that there are some programs, like the promotion of energy efficient construction through design research and dissemination of information

on energy devices and practices, it prefers private sector programs based on a shared savings approach.

I. JOHN V. HILBERG

Hilberg urges the commission to reject the Rate Agreement, stating the reasons for the rejection and sketching the characteristics of a plan that the commission would find acceptable, including commission treatment of any Seabrook rate case that could eventuate instead of a new plan. He states that NU has not met its burden of proof in the following areas:

that either Seabrook should be valued at \$1.5 billion or there is some other compelling reason to recognize a regulatory asset of \$800 million;

that the NH share of the synergies are worth at least \$300 million;

that PSNH's bankruptcy is harmful to the degree that regulatory oversight of PSNH should be replaced for seven years and of Seabrook permanently by the terms of the Agreement;

that the ironclad, irreversible

provisions of the Agreement represent a balancing of interests;

that the seven year 45.6% rate increase is just and reasonable and the best achievable alternative for New Hampshire; and

that the NU plan has replaced uncertainty with rate stability, given the likelihood of rate increases due to failure to attain all the synergies (especially at Seabrook), the probability of self-generation by large customers, and the fallibility of load forecasts.

Hilberg argues that evidence in the bankruptcy court indicates that this Agreement represents the "best interests" of the investors and therefore it cannot also reflect the best interests of consumers. He states that no rate plan that guarantees rate increases for seven years and creates the danger of severe damage to the state's economy can be considered just and reasonable unless the commission assumes that the alternative rate case would find the regulatory value of Seabrook at twice its economic value, and that in the current record, no

substantial basis exists for placing any specific value on PSNH's share of Seabrook. He argues that there is little value to the consensual resolution of the bankruptcy, as the Bankruptcy Court could be expected to act expeditiously now that it has completed the fact finding aspect of the case; and/or to NU's assurance of adequate long-term supply of power, as with Seabrook on line PSNH is expected to have sufficient capacity of its own for a decade. He criticized the Agreement for encouraging energy profligacy, for the bias in FPPAC whose treatment of off-system capacity sales renders PSNH indifferent to whether or not New Hampshire retail customers can afford to buy electricity, and for its miscalculation of real rate increases, and he makes the specific recommendation that the commission should disallow the 'golden parachutes' in any case.

Hilberg delineates the characteristics of a plan that the commission could find acceptable, proposing that the new plan could be structured like the Rate Agreement but with an Acquisition Premium no larger than the synergies that can be demonstrated to skeptics. He suggests that the resulting regulatory value would be as follows:

Non-Seabrook Assets:	\$800 million
Seabrook:	700 million
Regulatory Asset (synergies)	<u>250 million</u>
Total	\$1,700 million

Should no new plan be presented, the commission could state that the Seabrook rate case would be heard within the framework that no synergies would be recognized, Seabrook recovery would be based on an economic value of \$700 million plus whatever other prudent costs the owner can demonstrate and any

recovery beyond \$700 million would be subject to the rule that rates would not be allowed to be destructive.

Alternatively, Hilberg proposes a New Hampshire Plan in which the commission would first establish the primacy of the criterion that rates cannot be destructive, defined as creating widespread pain when customers leave the system or avoid entering the system, in such numbers that total sales drop. He proposes that the commission establish a rate base that includes Seabrook's found economic value, which he estimates to be in the neighborhood of \$700 million. The company would be allowed traditional recovery on this rate base. He then suggests that the commission calculate the prudently incurred costs of Seabrook in excess of its economic value, which would be placed in a deferral account where they would

accrue interest and be amortized on a straight line over the expected life of the asset. These costs would be subject to a non-economic prudent costs recovery adjustment. He proposes that annually or semiannually, for the life of the plant, the commission would ascertain whether the rates being charged were destructive, and estimate the highest level of rates that could be charged during the upcoming period without becoming destructive. In years in which rates could be raised without becoming destructive, PSNH would be allowed to draw down the deferral account until the threshold was reached.

III. COMMISSION ANALYSIS

A. RATES PRESCRIBED BY THE RATE AGREEMENT ARE JUST AND REASONABLE

Rate Agreement

The Rate Agreement of November 22, 1989 (Ex. D, NU 1-E) between NUSCO acting on behalf of its parent NU, and the

Governor and Attorney General of the State of New Hampshire is a rational plan contemplating the resolution of the reorganization proceedings of Public Service Company of New Hampshire under Chapter 11 of the Federal Bankruptcy Code. The purpose of the Agreement is to express the obligations of NU and the State with respect to NU's proposed acquisition of Psnh and the consummation of NUSCO's Plan of Reorganization for PSNH. NU agrees to undertake good faith efforts (i) to restore PSNH's financial stability to permit Reorganized PSNH to provide continued service to its ratepayers, (ii) to provide residents of the State of New Hampshire with needed electric capacity, and (iii) to negotiate with the joint owners of Seabrook authorization for an NU system company to assume responsibility for the operation of Seabrook.

The Plan provides for acquisition by NUSCO of all common stock of PSNH by the First Effective Date (originally July 1, 1990, now August 1, 1990). Conditions for NUSCO's takeover by August 1, 1990, including regulatory approvals of NRC, the SEC, FERC, and tax rulings from the Internal Revenue Service, will not be granted in time for consummation of the Plan by the First Effective Date. Accordingly, NU plans to consummate the reorganization plan by the second effective date, pursuant to a merger agreement between NU, NUSCO and a new N.H. corporation to be created buy NU. NU acknowledges that based on delays at the FERC the plan will be accomplished under the two-step method, where PSNH will emerge from bankruptcy as a Stand-alone company committed to merge with an NU company after FERC approval of the part of the plan under its jurisdiction,

largely, Seabrook, wholesale rates and transmission. The merger agreement was approved by the Bankruptcy Court's confirmation order April 20, 1990 and made binding on PSNH, NU, NUSCO, and NU acquisition corporation without need for further action by any person or entity.

Based on total average retail rates of 9.02 cents per kilowatt hour in effect on September 15, 1989, the Rate Agreement prescribes seven annual increases of 5.5% commencing with a temporary rate increase as of January 1, 1990 to become permanent on the First Effective Date, and further increases of 5.5% on January 1, 1991, January 1, 1992, January 1, 1993, January 1, 1994, January 1, 1995, and January 1, 1996. The increases total in the aggregate for the seven-year period approximately \$271,000,000 (Wister Tr. April 16 at 108) and, on a compounded basis, increased base rates by 45% over

the 9.02 cents per KWH level.

Average retail rates under the Rate Plan are as follows:

	<u>cents KWH</u>
1989	9.02
1990	9.52
1991	10.04
1992	10.59
1993	11.18
1994	11.79
1995	12.44
1996	13.12

Source: NU 3J, att. 1, State 3, att. III, Chart 1, p. 2.

The Rates Equitably Balance Investor
and Consumer Interests

In the commission's scoping order we stated that we will determine "whether the rates equitably balance investor and consumer interests so that the rates will produce a reasonable return to investors

without imposing an undue burden on ratepayers and the economy of the state of New Hampshire." Our analysis and review of substantial evidence in this proceeding compels the conclusion that the rates are just and reasonable, fairly balancing the interests of investors and ratepayers.

The compromise rate plan yields the minimum rates necessary to finance the payment of the \$2.3 billion bankruptcy compromise to PSNH creditors and equity holders without unduly burdening ratepayers or the N.H. economy. Real rates (compared to nominal rates) are forecasted to rise one percent per year over inflation during the fixed rate period.

Mr. John J. Reed, consultant testified in behalf of the N.H. Business and Industry Association (BIA) that the acquisition of PSNH by NU is in the

public interest, that the rate agreement negotiated between the state and NU is reasonable, and that "... the rates which will result from the reorganization plan and the rate plan will be sustainable and bearable from the consumer's perspective, and will result in a viable utility after reorganization." BIA-1 at p.3. Mr. Reed reinforced his conclusion with an Electrical Price Study (BIA 2) and concluded that the rate plan avoids the higher level of rate increase evaluated in the study which would result in major load losses and significant economic impacts. BIA-1 at p.19. The level of rates being known for the fixed rate period offers a measure of predictability to ratepayers, which enables N.H. firms to project their cost for electric service in competing with out-of-state companies and thus provides a competitive benefit to the N.H. economy. BIA-1, at

19-20.

Comparison of Rate of Return to Cost
of Capital Under the Rate Agreement

Mr. Eugene Sullivan, Finance Director of NHPUC presented an analysis of Rate of Return compared to Cost of capital for the following four cases. Cost of capital was determined from projected cost of debt, preferred and equity apportioned according to the resulting capital structures.

CASE 1: REORGANIZED PSHN SEABROOK OPERATES				
YEAR	RATE BASE	NET OPERATING INCOME	RATE OF RETURN	COST OF CAPITAL
	(1)	(2)	(3)	(4)
1990	1,611,312	56,650	3.52%	11.38%
1991	1,586,359	156,991	9.90%	11.53%
1992	1,583,450	159,770	10.42%	11.61%
1993	1,476,469	157,660	10.68%	11.71%
1994	1,412,817	167,067	11.83%	11.74%
1995	1,369,513	171,530	12.52%	11.76%
1996	1,317,780	185,269	14.06%	11.76%
	10,307,700	1,054,937	10.23%	11.64%
				AVE.

1) PROJECTED BALANCE SHEETS ADJUSTED F-6 NU 1 E; ATTACHMENT 2 PAGE 8 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

2) PROJECTED OPERATING STATEMENTS ADJUSTED F-5 NU 1 E; ATTACHMENT 2 PAGE 7 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

3) COLUMN 2 DIVIDED BY COLUMN 1

4) ADDITIONAL SCHEDULES PAGE 6 OF 8 SEABROOK OPERATES; ALSO STAFF WORK PAPERS EXHIBIT STAFF 22

CASE 2: REORGANIZED PSHN SEABROOK CANCELLED				
YEAR	RATE BASE	NET OPERATING INCOME	RATE OF RETURN	COST OF CAPITAL
	(1)	(2)	(3)	(4)
1990	1,611,167	51,704	3.21%	11.43%
1991	1,585,750	165,180	10.42%	11.56%
1992	1,531,899	179,188	11.70%	11.61%
1993	1,474,006	204,342	13.86%	11.66%
1994	1,411,064	223,889	15.87%	11.69%
1995	1,371,406	170,006	12.40%	11.68%
1996	1,319,094	159,216	12.07%	11.71%
	10,304,386	1,153,525	11.19%	11.63%
				AVE.

1) PROJECTED BALANCE SHEETS ADJUSTED F-12 NU 1 E; ATTACHMENT 2 PAGE 11 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

2) PROJECTED OPERATING STATEMENTS ADJUSTED F-11 NU 1 E; ATTACHMENT 2 PAGE 10 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

3) COLUMN 2 DIVIDED BY COLUMN 1

4) ADDITIONAL SCHEDULES PAGE 6 OF 8 SEABROOK CANCELLED; ALSO STAFF WORK PAPERS EXHIBIT STAFF 22

CASE 3: STAND-ALONE PSHN SEABROOK				OPERATES
YEAR	RATE BASE	NET OPERATING INCOME	RATE OF RETURN	COST OF CAPITAL
	(1)	(2)	(3)	(4)
1990	2,197,978	61,729	2.81%	11.38%
1991	2,321,024	112,121	4.83%	11.53%
1992	2,302,838	146,897	6.38%	11.61%
1993	2,274,543	164,681	7.24%	11.71%
1994	2,232,551	188,394	8.44%	11.74%
1995	2,203,686	202,393	9.18%	11.76%
1996	2,162,421	219,957	10.17%	11.76%
	15,695,041	1,096,172	6.98%	11.64%
				AVE.

1) PROJECTED BALANCE SHEETS ADJUSTED F-18 NU 1 E; ATTACHMENT 2 PAGE 14 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

2) PROJECTED OPERATING STATEMENTS ADJUSTED F-17 NU 1E; ATTACHMENT 2 PAGE 7 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

3) COLUMN 2 DIVIDED BY COLUMN 1

4) ADDITIONAL SCHEDULES PAGE 6 OF 8 SEABROOK OPERATES; ALSO STAFF WORK PAPERS EXHIBIT STAFF 22

CASE 4: STAND-ALONE PSHN SEABROOK CANCELLED				
YEAR	RATE BASE	NET OPERATING INCOME	RATE OF RETURN	COST OF CAPITAL
	(1)	(2)	(3)	(4)
1990	1,604,697	49,318	3.07%	11.43%
1991	1,928,260	29,931	1.55%	11.56%
1992	2,249,062	197,004	8.76%	11.61%
1993	2,244,712	208,299	9.28%	11.66%
1994	2,229,054	220,147	9.88%	11.69%
1995	2,225,935	221,638	9.96%	11.68%
1996	2,206,749	230,573	10.45%	11.71%
	14,688,469	1,156,910	7.88%	11.63%
				AVE.

1) PROJECTED BALANCE SHEETS ADJUSTED F-21 NU 1 E; ATTACHMENT 2 PAGE 17 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

2) PROJECTED OPERATING STATEMENTS ADJUSTED F-20 NU 1 E; ATTACHMENT 2 PAGE 16 TO NU 5; STAFF WORK PAPERS EXHIBIT STAFF 22

3) COLUMN 2 DIVIDED BY COLUMN 1

4) ADDITIONAL SCHEDULES PAGE 6 OF 8 SEABROOK CANCELLED; ALSO STAFF WORK PAPERS EXHIBIT STAFF 22

In case 1, NU's base case, Reorganized PSNH-Seabrook Operates, it will be noted that in four years 1990-1994 the rate of return is projected to be less than the cost of capital. From 1994-1996 the rate of return is greater than the cost of capital. On average for the seven year fixed rate period, the rate or return is 10.23% compared to 11.64% cost of capital. In case 2, Reorganized PSNH-Seabrook Canceled, the rate of return exceeds the cost of capital from 1992-1991. Application of Mr. Busch's supplemental testimony on financing costs, NU 5-B to costs of capital results in an average cost of capital for seven years of 11.2% and, if 100 basis points are added to cost of non-plan financing over the seven-year period, would increase on average to about 11.73%. In case 3, Stand-alone PSNH-Seabrook Operating, and case 4,

Seabrook-Canceled, the rate of return is substantially less than the cost of capital.

The assumptions used for projected financial statements, balance sheets and income statements are summarized at pp. 1-6 of Busch Att. 2, NU5. Detailed assumptions are summarized in the Financial Viability section infra. Among the assumptions are:

Peak Load Growth 2.3% compound growth

Seabrook Capacity Factors	1990	60%
	1991	63%
	1992-5	67%
	1996	70%

O&M Expenses 5.3% compound growth

Compound Growth Rates for Fuel Expenses
(1990-1996)

#6 Oil at Newington and Schiller	7.9%
Coal at Merrimack	3.3%
Coal at Schiller	4.1%
#6 Oil at Wyman	6.8%
#2 Oil	6.8%
Jet Kerosene	6.7%

Determination of the level of just and reasonable rates by traditional ratemaking methodology, is precluded by

the Rate Agreement's prescribing the level of retail rates of the seven year fixed rate period. Revenue requirements are normally determined or derived by application of a formula:

$$R + O + (B \times r)$$

where R is the utility's allowed revenue requirement; O is the allowed operating expense; B is its rate base defined as cost less depreciation of the utility's property that is used and useful in the public service, (RSA 378:27) and r is the rate of return allowed in the rate base. Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 633-634, Appeal of Public Service Company of N.H., 125 N.H. at 49. However, in this instance, the allowed revenue requirement is fixed for seven years by the rate agreement subject to prospective demand for electricity by PSNH ratepayers and wholesale customers over the seven-year

period. NU 1-E at Pp, D-12-13.

Here, the rate base (or its investment equivalent) determined by the Reorganization Plan approved by the Bankruptcy Court to be \$2.3 billion consisting of \$800 million of non-Seabrook assets, \$700 million of Seabrook Assets, and an acquisition premium of \$800 million. The Acquisition Premium is the difference between the settlement amount of \$2.3 billion and the \$1.5 billion total of non-Seabrook assets and Seabrook assets. The amortization of the Acquisition Premium affects rate base substantially during the seven-year fixed rate period, since \$425 million of the Acquisition Premium will be amortized on a straight line basis and recovered with a return over seven years beginning on the First Effective Date. The balance of about \$375 million will be recovered with a return over 20 years from the First

Effective Date. NU 1-E, Ex. D (b) D-14.

Operating expenses are a product, inter alia, of volatile costs and expenses, the impact of projected synergies upon costs, the likelihood that Seabrook will operate successfully at full power at anticipated capacity factors, and cost of fuel. Projections of operating expenses over seven years appear to be reasonable to the extent synergies and cost efficiencies are attained. To limit so far as possible attrition in ROE through unanticipated levels of operating expenses, the commission will exercise continuing oversight of the impact of operating expenses on net income, including prudence review.

Comparison of the Rate Agreement Plans
with those Proposed by PSNH During the
Bankruptcy Proceedings

During the negotiations in

bankruptcy, the state compared the NU plans first against plans proposed by PSNH's management under a series of regulatory scenarios:

(1) Reorganization of PSNH into a holding company, a generation and transmission company subject to FERC jurisdiction, and a distribution company subject to NHPUC jurisdiction. Such reorganization would have permitted PSNH to seek from FERC a one-time rate increase of 89% to recover its costs of Seabrook followed by annual rate increases of 5% equal to the projected rate of inflation. By 1998 rates would have exceeded 25 cents per kwh. PSNH recognized that this plan would have a negative impact on the state's economy and could not be sustained. The State

opposed the 89% increase.

(2) As an alternative, PSNH postulated a maximum one-time increase of 31% plus annual rate increases equal to inflation as sustainable under the N>H. economy. The State objected to PSNH's proposed solution to its financial difficulties. A 31% increase plus 10 increases of 5% would result in rates of 17 - 18 cents per kwh in 1998 and 1999.

The forecasted rates under the NU Plan, compared to rates under traditional ratemaking resulting from an assumed \$1.8-2.9 billion of Seabrook investment, and compared to an 89% one-time increase (for \$2.9 billion) and a 31% increase (for \$1.8 billion) are summarized in Table 3 below.

TABLE 3

NORTHEAST UTILITIES PLAN VERSUS POTENTIAL

AVERAGE RETAIL RATES
CENTS/KWH

YEAR	NU PLAN	1.8B	89% ONE TIME INCREASE	31% ONE TIME INCREASE
1990	9.52	9.74	17.05	11.82
1991	10.04	10.33	17.90	12.41
1992	10.59	10.81	18.80	13.03
1993	11.17	11.48	19.73	13.68
1994	11.79	12.11	20.72	14.36
1995	12.44	12.8	21.76	15.08
1996	13.12	13.56	22.85	15.83
1997	12.85	13.74	23.99	16.63
1998	13.40	13.91	25.19	17.46
1999	13.30	13.83	26.45	18.33

Source: Attachment III, Chart 21, p. 2 of 2 Volume III, Direct Testimony of Alan Kessler. State 3C.

Comparison of Rates Under the Rate Agreement with Foreseeable Rates Under Traditional Ratemaking

Rates resulting from traditional ratemaking would probably be higher than under the Rate Agreement. Clearly we cannot predict the precise level of rates under traditional ratemaking for Stand-alone PSNH. Nor is such determination required to determine whether the Rate Plan serves the public good with just and reasonable rates over the fixed rate

period.

Assuming PSNH becomes a NU affiliate under the merger agreement and including PSNH's Seabrook investment and the acquisition premium in rate base, NU estimates that an initial rate increase of 20% followed by 2.5% increases annually over the remainder of the fixed rate period would be required. Ex. NU 3 J at 13-15, Att. 1 pp. 1-3. The increase summarized below would be required to maintain a 13.25% return on common equity.

	<u>RATE PLAN</u>	<u>TRADITIONAL RATEMAKING</u>
	Average Retail	Average Retail
<u>year</u>	<u>Cents per kwh</u>	<u>Cents per kwh</u>
1989	9.02	9.02
1990	9.52	10.80
1991	10.04	10.73
1992	10.59	11.07
1993	11.18	11.52
1994	11.79	11.77
1995	12.44	12.18
1996	13.12	12.45
1997	12.86	12.87
1998	13.40	13.41
1999	13.30	13.31
2000	13.05	13.02

Cumulative retail revenues and cumulative net present value of retail revenues through the fixed rate period and the year 2000 are higher with traditional ratemaking than under the Rate Plan. Since the seven 5.5% increases under the Rate Plan are not controlled by a requirement that each year produce a 13.25% ROE, the Rate Plan avoids rate shock by providing for a gradual increase in rates producing a cumulative ROE of 11.75% by 1997, less than the market ROE required by traditional ratemaking principles.

If PSNH were to remain a stand-alone entity, rates would be higher under traditional ratemaking because the synergies resulting from the merger would not apply and financing costs would increase, assuming that, 1. PSNH's rate base will equal the \$2.3 billion investment base resulting from the NU

acquisition, and 2. Seabrook value of \$1.5 billion (\$2.3 billion minus non-Seabrook assets of \$800 million) hypothetically allowed by NHPUC in rate base.

There is substantial evidence supporting a possible commission allowance of \$1.5 billion for Seabrook in Stand-alone PSNH's rate base although the theoretical economic value of Seabrook for purposes of this proceeding is \$700 million:

- o Testimony of Eugene Sullivan estimating Seabrook investment for a rate base between \$1.4 billion and \$1.9 billion and offering his opinion that after a prudency review of Seabrook costs a value higher than \$1.5 billion might be allowed in rate base (pp. 8 & 17, Staff 4), possibly between \$1.8 billion and

\$2.9 billion. Tr. May 4 at 99-100.

- o Testimony of Alan Kessler, (Ernst & Young) expert consultant for the State estimates Seabrook investment in a rate case at \$1.5 billion. Tr. May 1 at 59-60.
- o Report of Paul L. Gioia, Examiner regarding a Seabrook rate case as an alternative to proposed Plan of Reorganization established a range of Seabrook recoveries at high end of \$1.6 - \$1.9 billion with total company values of \$2.5 to \$2.7 billion; and a low end of Seabrook recoveries from \$1.28 to \$1.56 billion with total company values from \$2.18 to \$2.46 billion. Mr. Gioia concluded that "this range compares with a Seabrook recovery of \$1.4 billion and a total company

value of \$2.3 billion under the proposed plan". Ex. Hydro 3 at p. 26.

- o The Examiner also concluded that the percentage of Seabrook assets allowed after a prudence review if applied to PSNH, would yield about \$1.5 billion. Ex. NU 3J at 14-15.
- o Mr. Noyes testified that the probable result of a Stand-alone PSNH Seabrook rate case would be a Seabrook value between an approximate range of \$1.4 to \$1.8 billion. The upper range of \$1.8 billion was consistent with the assessment by PSNH's management that competitive pressure make recovery of a higher value unlikely without risking substantial losses in sales.

Mr. Noyes also pointed out that PSNH management has written down its Seabrook investment to \$1.8 billion (from \$2.9 billion). Mr. Noyes estimated the lower boundary at \$1.4 billion. NU 3J at pp. 13-16.

- o Mr. Andrew Herf of Arthur Andersen & Co. testified before the Bankruptcy Court that the \$2.3 billion value of PSNH under the NU Plan of Reorganization was within the reasonable range of outcomes of a litigated rate case. Ex. NU 20 at 33 and 36.
- o PSNH's estimate of the value of Seabrook in its financial statements was \$1.8 billion. NU 1-E at Ex. C, p. 38, Note 3 to financial statements of PSNH in Form 10K for the year ended December 31, 1989, Staff Ex. 20.

Comparison of Rates Under the Rate Agreement with Rates Forecasted for Other New England Utilities

We are mindful of established law in this jurisdiction that "[o]f itself, the evidence relating to rates elsewhere has not conclusive probative force". Appeal of Conservation Law Foundation, 127 N.H. 606, 646 (1986) citing Company v. State, 95 N.H. 353 at 363 (1949). We have determined that the rates under the Rate Agreement are just and reasonable based on record evidence and detailed analysis of all aspects of the compromise plan. We have examined resulting rates in comparison to rates elsewhere in New England to determine whether the compromise rates are competitive with those of other New England utilities. The evidence showing that rates under the rate agreement are marginally higher than the price of electricity forecasted by Data Resources for the New England

region, and substantially lower than prices forecasted for UI, the second largest owner of Seabrook, supports the conclusion that New Hampshire will not be disadvantaged competitively by PSNH's electric rates. Ex. NU 9, HO CAD03 Q-OCA-075 at Table 5. Reasonably stable rates are predicted for PSNH after the fixed rate period. Table 5, Ex. NU 9.

We cannot accept Mr. Talbot's testimony that by 1996, PSNH's rates may be 48% higher than average New England utility rates. A 1 - 1.5% growth rate in the future, predicated on zero inflation, flat oil prices accompanied by huge sales growth is not a realistic forecast. Noyes-Sabatino Rebuttal Testimony. Ex. NU 3J, at 26-28.

A comparison of NEPOOL nominal rate projections for 1991-1996 with nominal rates forecasted under the Rate Agreement shows that NEPOOL rates are forecasted to

be on average marginally equivalent to the rates under the NU plan.

COMPARISON OF
NEPOOL AND RATE AGREEMENT PROJECTIONS
NOMINAL RATES

<u>Year</u>	<u>Rate Agreement</u> <u>Cents per kwh</u>	<u>NEPOOL</u> <u>Cents per kwh</u>
1989	9.02	8.30
1990	9.52	9.19
1991	10.04	9.72
1992	10.59	10.42
1993	11.18	11.03
1994	11.79	11.52
1995	12.44	12.01
1996	13.12	12.55

Source: NEPOOL Electric Price Forecast for New England, 1988-2004, p.2, Ex. 1.

Comparison of Rates Under the Rate
Agreement with Rates Under Alternative
Plans

In its Report and Order on Scope (Order No. 19,674), the commission stated that in judging the reasonableness of the level of rates, it would examine, pursuant to RSA 362-C: 5, alternative reorganization plans that were filed in the PSNH bankruptcy case and would result in the same or lower costs and risks to

ratepayers and the same or greater benefits to the state as those resulting from the NU Plan. No such alternative reorganization plan as defined by RSA 362-C:2, was presented to the commission.

Hilberg has proposed in brief a "New Hampshire Plan", structured like the NU Rate Plan but containing a Regulatory Asset of an estimated \$250 million representing synergies, rather than an acquisition premium of approximately \$800 million. He proposes that if no party presents such an alternative plan, the commission should state that the Seabrook rate case would be heard within a framework that no synergies would be recognized as \$700 million plus whatever additional prudent costs that would not result in destructive rates. (Hilberg's specific objections to the NU Rate Plan are addressed elsewhere in the Commission

Analysis).

Consideration of Hilberg's "New Hampshire Plan" by the commission is beyond the scope of this proceeding. It was not presented to the Bankruptcy Court and, while such a plan could conceivably result in lower costs and risks or greater benefits to ratepayers and the state, there is no evidence to indicate that it would affirmatively resolve the bankruptcy case that it would withstand judicial review of the proposed treatment of the costs of the Seabrook investment or that without merger with NU the plan would be workable and serve the public good. Hilberg is in essence asking for a reconsideration of our scoping order, already denied by Order No. 19,703. He proffers hypothetical rate plans and outcomes of rate proceedings as standards of just and reasonable rates against which to measure the NU Plan. However,

substantial evidence has been presented in this proceeding and before the Bankruptcy Court relating to the reasonably possible rates resulting from a Seabrook rate case considered under traditional ratemaking. The Bankruptcy Court concluded, and our own analysis confirms, that the rates under the Rate Agreement represent "a fair and equitable settlement and compromise well within the range of results reasonably expected in a litigated rate case." Ex. NU 14 at 12: NU 20 at 54.

The Bankruptcy Court's Confirmation of the Fairness of the Compromise Reorganization was Reasonable

Our evaluation of the Bankruptcy Court's confirmation of the reorganization plan leads to the conclusion that in resolving the PSNH bankruptcy the public interest will be served by our independent analysis of the

appropriate implementation of the rate agreement.

The Bankruptcy Court found that the rate agreement is fair, reasonable, consistent with the public policy and the public interest and is in the best interests of creditors and equity security holders of the Debtor.

The Bankruptcy Court denied the contention of Messieurs Rochman, Kaufman and Richards - dissident stockholders - that greater value would be realized by stockholders in a litigated rate case before the NHPUC as opposed to the compromise embodied in the Rate Agreement under the plan. The Bankruptcy Court concluded:

The sum total of the evidence before the court on the issues supports a finding --- here made --- that the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expected in a litigated rate case. Ex. NU 14 at 12; Ex. NU

20 at 54.

The court further stated that the plan must provide each holder of a claim or interest that has not accepted the Plan with an amount equal to or greater than the amount such holder would receive under Chapter 7. The Court evaluated the liquidation value of the debtor looking first to the breakup value of PSNH. The record evidence suggested that the value of the pieces is less than the Debtor's going concern value. Moreover, the question would remain as to who would bear the responsibility to serve PSNH customers. The Court concluded that if PSNH would be sold in pieces, it would bring less than the amount offered under the plan.

An alternative liquidation analysis would be the value of PSNH sold as a going concern. The Court found that the liquidation value of the debtor is no

higher than the value that is proposed under this Plan. The bankruptcy was, in effect, an auction of PSNH, which has been highly publicized and generated national attention and substantial and serious bidders, particularly United Illuminating Company, New England Electric Company, and PSNH Management, as well as Northeast Utilities. (Par. 62 Findings cited at p.6, Memorandum Opinion, NU 20).

The Rate Agreement adds value to the Debtor so that in the absence of a Rate Agreement, the debtor would not command as high a price in a Chapter 7 liquidation. The relative certainty of rates and the revenues generated without the delay and cost of litigation are also important considerations favoring the compromise settlement.

The Court analyzed a "non-normal liquidation scenario". It compared the

return to the estate under the Plan with the return the Debtor or its successors could expect to receive under a traditional ratemaking proceeding for its interest in the Seabrook plant. Par. 69, Findings cited at p.8 NU 20. An indicated one-time increase of approximately 89% would be necessary to support a \$2.9 billion addition to PSNH's rate base (p.72 NU 1-E). Even if for rate purposes the Seabrook investment was reduced to \$1.8 billion, the resulting rates sought from the NHPUC would be excessive in comparison to the Rate Plan. (p. 73 NU 1-E, p. 25-26, NU 20). The Court rejected RKR's objection contending that a litigated rate case would result in more value for the Debtor than that proposed under the Plan.

The Bankruptcy Court found that the proponents have shown by a preponderance of the evidence that there is a

reasonable likelihood Reorganize PSNH will in fact be able to perform its obligation under the Plan as projected. In determining that the Reorganization Plan met the feasibility test (Code 1129 (a) (11)) the Court considered the adequacy of the capital structure, the earning power of the business, economic conditions, and the ability of management. In Re Agawam Creative Marketing Ass'n., Inc., 63 B.R. 612, 619-620 (Bankr. Mass. 1966). The court concluded that based on record evidence, particularly the testimony of the financial advisers upon confirmation, the Debtor will be able to satisfy its obligations under the Plan. P.30, General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues, Bankruptcy Court. Ex. NU 14.

The applicable legal standard for a bankruptcy reorganization court to

evaluate a substantial compromise as part of the Plan of Reorganization was outlined in Protective Committee v. Anderson, 390 U.S. 414 (1968). Essentially, the reorganization court must closely examine and review the proposed compromise to determine whether the compromise is a fair and equitable Reorganization Plan, comparing the terms of the compromise with the likely rewards of litigation. There are practical limits to the Court's examination of the details underlying the controversy: "A district court, in reviewing a settlement proposal, need not engage in a trial of the merits for the purpose of settlement is precisely to avoid such a trial." Greenspun v. Bogan, 462 F.2d 375, 381 (1st Cir. 1974), citing United Founders Life Ins. Co. v. Consumer's National Life Ins. Co., 447 F.2d 647 (7th Cir.1971); Florida Trailer & Equipment Co. v. Deal,

284 F.2d 567, 571 (5th Cir. 1960).

The discretionary power of the Bankruptcy Court to approve or disapprove compromises or settlements resides in Bankruptcy Rule 9019. In approving a settlement amount of \$3 billion of a claim by Pennzoil against Texaco in the amount of \$11.3 billion pursuant to a Plan of Reorganization, the Reorganization Court emphasized the benefits of settlement to avoid expensive and protracted litigation; the proportion of class members affirmatively supporting the Plan, the extent to which the settlement is the product of "arms-length" bargaining, the likelihood of success of the parties in a litigated case limited to concrete benefits of a settlement without the expense of a trial and subsequent appellate procedures. In Re Texaco, Inc. 84 B.R. 893 (Bankr. S.D. N.Y.-1988), appeal dismissed, 92 B.R. 38

(S.D. N.Y. 1988).

In addition to the hypothetical inclusion in rate base of Seabrook investment at about \$1.5 billion, under traditional ratemaking rate of return is essential for a forecast of rates. Under the Rate Plan, PSNH will earn less than the cost of money on average over the seven-year fixed rate period. See cases (1), (2), (3) and (4), *supra*. A traditional rate case would require a rate of return at least equal to the cost of capital under test year principles. Appeal of Cheshire Bridge Corp., 126 N.H. 425, 431, 432 (1985), Conservation Law Foundation, 127 N.H. at 635. Cost of capital and rate of return may be determined by the commission based on the evidence before it. New England Tel. & Tel. v. State, 104 N.H. 229 at 232 (1962), New England Tel. & Tel. v. State, 95 N.H. 353, 361 (1949).

Revenue requirements under the Rate Agreement are less than under traditional ratemaking which would require rates of return produced by rates equal to the cost of capital. Financing costs underlying the Rate Agreement are estimates of actual embedded costs and therefore are in accord with traditional ratemaking principles. Hypothetical Stand-alone PSNH would probably incur higher costs since investors would not have the assurance of the Rate Agreement. Ex. NU 6, Curley pre-filed direct testimony at 20.

B. BASE RATES

The rate base which forms the investment basis for base rates (as opposed to FPPAC) consists of the \$800 million book value of PSNH's non Seabrook assets plus the Acquisition Premium. The commission will require PSNH to file a detailed accounting of the

reorganization, including severance payments to employees and senior management. That accounting should provide the calculation of net book value and the Acquisition Premium at the First Effective Date. At that time, the commission will address the issue raised by the State in its Supplemental Proposed Finding of Fact, of whether all fees, expenses and obligations incurred by NU in the resolution of the PSNH bankruptcy and proposed acquisition, whether paid or not, on or before the First Effective Date shall be included in the \$2.3 billion capitalization ceiling or added to the Acquisition Premium.

The Acquisition Premium Serves the Public Interest

The Acquisition Premium is equal to the difference between NU's \$2.3 billion acquisition cost for PSNH and the sum of the \$700 million assigned value of

Seabrook plus the \$800 million book value of PSNH's non-Seabrook assets at the First Effective Date. (\$2.3 billion minus \$1.5 billion = \$800 million) Ex. NU 1-E D-5, D-6). The result of this calculation creates the Acquisition Premium will be established at the First Effective Date, Ex. No. 1E at D-6, Ex. E to Rate Agreement, D-110. The Acquisition Premium in this procedure is not a payment for PSNH assets in excess of net book value and therefore is not an acquisition premium as the term is normally defined in traditional regulation.

The acquisition adjustment is not depreciable for income tax purposes. As part of the rate plan, the acquisition adjustment is amortized over twenty years, \$425 million of the acquisition premium is amortized over 7 years and the remaining \$364 million is amortized over

20 years.

Mr. Sullivan testified that "in terms of traditional ratemaking it would be more appropriate if the acquisition adjustment were assigned to the Seabrook investment to arrive at a value of \$1.489 billion, or a per KW value of \$3,640 per KW. The Seabrook investment would then be depreciated 40 years and benefit from accelerated depreciation. Seabrook's costs would be more matched with the use of that power if the costs are spread over its life". Sullivan Staff 7 at 12-B. Mr. Sullivan also testified that the plan in effect assigns the acquisition value to non-Seabrook assets inconsistent with a realistic appraisal of Seabrook and non-Seabrook assets. He acknowledged, however, that assigning the acquisition adjustment to the value of Seabrook would increase the FPPAC because additional depreciation and capital costs

would be flowed through to ratepayers and cash flow to NU would be reduced since the acquisition adjustment would be recovered over the life of the plant (40 years) instead of twenty years. Staff 4 at 13. Also, if the rate plan was structured to add the acquisition adjustment to Seabrook value on the North Atlantic Company overall capital costs, debt and equity, would be higher. Mr. Sullivan testified that with Seabrook running, rates are just and reasonable.

Mr. Sullivan concluded that changing the structure of the plan would cause disruption of a carefully constructed compromise.

The Acquisition Premium, as a regulatory asset in PSNH's rate base enables PSNH to utilize tax benefits more effectively (Kessler Tr. May 1 at 179-80) and to schedule asset amortization consistent with financial requirements

and limits on rate recovery by reorganized PSNH. Noyes Transcript April 17 at 147-53. Robust cash flow reduces external financing and financing costs, and therefore, rates over the longer term. Tr. april 19, at 35-36. the commission is persuaded that the Acquisition Premium meets the policy goal of the reorganization to balance expeditious recovery of creditors' and shareholders' investment with minimal rate increases anticipated by ratepayers.

Mr. Neil H. Talbot, Senior Economist with the Energy Systems Research Group (ESRG) of TELLUS Institute (witness for the Consumer Advocate) testified that the Acquisition Premium should not be allowed in PSNH's rate base unless NU will guarantee claimed cost savings due to the merger. Ex. OCA 1, Talbot pre-filed direct testimony Exhibit C (NT-2) at 8, 16-19. Mr. Talbot relies on a treatise

by James C. Bonbright, Principles of Public Utility Rates (1961) pp. 176-178, which postulates that an acquisition premium should not be allowed in rate base unless the acquirer can justify the premium above the net book value of total assets. Mr. Talbot's argument is inapposite to the acquisition adjustment in this case, since NU is not paying a premium above the net book value of PSNH assets. As we have seen, reduced to simplest terms, NU pays a total of \$2.3 billion for PSNH assets recorded at \$3.7 billion on PSNH's regulatory books and \$2.6 billion on its financial books. Ex. NU 3-J, Noyes/Sabatino Rebuttal Testimony at 8. In the traditional sense as used by Bonbright there is no true acquisition premium requiring justification by a demonstration of the public good.

Assuming, arguendo, that the Acquisition Premium is a payment in

excess of net book value, N.H. law would permit recovery of the regulatory asset. If the acquisition price for PSNH's assets serves the public good -- as we find herein -- the total purchase price, including the Acquisition Premium, may be included in rate base. Public Service Co. v. New Hampton, 101 N.H. 142, 150-151 (1957); Accord Appeal of Public Service Co. of New Hampshire, 124 N.H. 479 (1984), citing Greenville Electric Lighting Company and Public Service Company, 56 N.H.PUC 188, 192-95 (1971) and N.H. Electric Coop and Franconia Paper Co., 56 N.H.P.U.C. 253 at 261 (1971).

The standards justifying the addition to rate base of an acquisition premium relate to:

- (1) whether the acquired assets may be operated as an integral part of the acquirer's system;
- (2) whether the purchasing utility

may better provide necessary capital to finance the operations of the system;

(3) whether the purchasing utility can furnish engineering, accounting and other management services needed by the seller; and

(4) whether the purchasing utility can more economically operate the system, particularly where the selling utility is bankrupt.

NUSCO articulates these standards in its brief at p. 28, and states that NUSCO has proven that its acquisition of PSNH meets these criteria.

First, NU and PSNH complement each other's system due to diversity of seasonal peaks and operating efficiencies in the joint operation and dispatch of electricity from their system. Second, NUSCO has demonstrated its ability to refinance PSNH by providing capital necessary to resolve the PSNH bankruptcy and restore financial stability to PSNH, infra. Third, the Management Services

Agreement approved by the Bankruptcy Court and the FERC, will supply PSNH -- before and after the merger -- with strong management and access to financial, engineering, administrative, accounting and operational resources. Ex. NU 2, Ellis, Pre-filed Direct Testimony at 47-52; Tr. April 11 at 43, 122-24; Ex. NU 7 Opeka Pre-filed Direct Testimony at 37-52; Tr. April 24 at 9-10, 42-47, 50-56. Substantial economies in the operation of PSNH will accrue through implementation of various synergies outlined infra.

The Acquisition Premium is not related to the Investment Adder. The State incorporated in the rate agreement the precept that rates would not be prescribed to support an investment of more than \$2 billion to settle the bankruptcy, unless any amount up to \$300 million over the \$2 billion was justified

by capitalized ratepayer benefits caused by NU through the reorganization. Tr. April 12 at 262-63. If NU demonstrates to the commission efficiencies or cost synergies to justify the \$300 million increase to the investment base, the Investment Adder increases the ceiling calculation of the ROE collar to allow a return on \$2.3 billion, before the ROE on such investment would cause a rate reduction. The \$300 million Investment Adder would not affect any component of Seabrook or non-Seabrook rate base or assets or the Acquisition Premium. The Acquisition Premium is a regulatory asset unaffected by benefits brought to the reorganization by NU.

Mr. Talbot's direct testimony asserts that "it would not be proper from a ratemaking standpoint to allow the acquisition premium or the 'investment adder' which is part of it in the rate

base, unless there were a strong justification on the grounds of the public interest". Talbot, OCCA-1 at pp. 4-5; See Report to the State of New Hampshire Office of the Consumer Advocate, pp. 2-3. Mr. Talbot is in error in relating the synergies to the Acquisition Premium as the "ultimate rationale for the acquisition". p. 3, Report, OCA-1.

We find that the Acquisition Premium of \$789 - \$800 million is a regulatory asset amortized in accordance with generally accepted accounting principles and serves the public interest.

Fred H. Balluff, CPA consultant for the Hydro Intervenor testified that the entire Acquisition Premium should be considered as an additional cost related to Seabrook. Hydro 1A, p. 2, and depreciated over the designated useful life of 39 years. Hydro 1A, p. 3. Mr.

Balluff offered three alternative accounting changes to the acquisition adjustment to The Seabrook investment:

(1) Transfer the \$789 million acquisition adjustment to North Atlantic as a cost of the Seabrook plant and depreciate the investment over 39 years.

(2) Transfer the \$789 million acquisition adjustment to North Atlantic as an acquisition adjustment to be amortized by North Atlantic in the same manner proposed for PSNH.

(3) Consider the acquisition adjustment part of the cost of power from Seabrook, but keep the \$789 million on the books of New PSNH as deferred cost as proposed by NU except classify the amortization as purchased power cost. (Account 555 in FERC Chart of Accounts).

Both staff and the state oppose the adoption of Mr. Baluff's suggestions. Ex. Staff 4, Sullivan Pre-filed Direct Testimony at 12-14, state request for findings #13.

There is no rational justification for the requested changes. The Rate Agreement's accounting treatment of the

Acquisition Premium is consistent with generally accepted accounting principles. Sullivan, Tr. May 4 at 60-63. The Acquisition Premium is the remainder of the value not assigned to Seabrook and PSNH's non-Seabrook assets, as a result of the negotiated settlement inscribed in the Rate Agreement. Options (1) and (2) above constitute a substantive change in the rate agreement requiring approval of the creditors and equity committees and the Bankruptcy Court. The two options do not enhance the compromise reorganization plan and would endanger its viability.

Mr. Balluff's third option characterizing the Acquisition Premium as a "deferred purchase power cost" could disrupt a fundamental provision of the Rate Agreement without adding substance to agreement. Tr. May 1 at 220-27. Change in accounting treatment or redefinition of the Acquisition Premium

would probably require approval of the parties and the Bankruptcy Court and would delay PSNH emergence from bankruptcy while unnecessarily risking its ultimate success. In the absence of compelling need -- not here demonstrated -- the commission does not believe the rate plan should be drastically compromised by assigning the acquisition adjustment to Seabrook.

Return on Equity

ROEs for Reorganized PSNH and North Atlantic Energy Company

Reorganized PSNH expects to earn a cumulative net present value ROE of 11.75% over the fixed rate period, or 150 basis points below the ROE collar cap. Ex. NU 1-E at D-81; Ex. NU 3, Noyes Prefiled Direct Testimony at 14. The Seabrook Power Contract establishes an ROE for NAEC of 13.75% for ten years, and thereafter at the average of allowed

ROE's of the Yankee Companies. FERC has disallowed such automatic adjustment. (Ex. A to the Rate Agreement, Ex. NU 1-E D28). The 13.755 ROE for NAEC is reasonable for a newly capitalized company. NAEC will be a single asset company owning a controversial nuclear power plant at Seabrook, with a single customer, New PSNH. There will also be the regulatory risk of two prudence reviews, by NHPUC and the FERC for the duration of the power contract. The 11.75% ROE for PSNH is below the market return for a hypothetical Stand-Alone PSNH.

According to Mr. Curley (NU financial witness), the anticipated ROE's of 11.75% and 13.75% are below the 13% to 14% market-required ROE's for electric utilities. Tr. April 20 at 86-87. PSNH's emergence from bankruptcy would require a return even higher than the

market rate due to higher debt costs and risk premium for equity. Tr. April 20 at 87-88.

Mr. Kessler's testimony that the Rate Agreement will produce a fair return to investors supports the proposition that the ROE's under the Rate Agreement are reasonable. Tr. May 1 at 235-36.

The ROE Collar Stabilizes Just and Reasonable Rates Over the Fixed Rate Period

The ROE Collar limits the range of return on equity to be realized by the rates during the fixed rate period by:

(1) Capping PSNH's CUM NPV ROE at 13.25% based on NU's investment in PSNH; and

(2) Prescribing a floor on CUM NPV ROE, beginning at 8% in 1993, 9% in 1994, 9.75% in 1995, and 10.5% in 1996. Att. 2, Staff Ex. 1, Ex. NU 1-E at D-12 and Exhibit B.

ROE Ceiling

The ROE ceiling is calculated based on PSNH earnings and average common

equity balances to the extent the New Hampshire Public Utilities Commission finds that Reorganized PSNH has justified an investment adder of at least \$300 million above an investment of \$2 billion. Rates paid by PSNH ratepayers will grant PSNH the opportunity to earn up to 13.25% on its \$1.6 billion investment (\$800 million non-Seabrook assets + \$800 million acquisition premium) and will allow NAEC to recover its \$700 million investment for Seabrook in the purchase power contract. Allowance of the \$300 million Investment Adder is predicated on the NHPUC's finding that NU will cause operational savings and other synergies to result in a reduction in revenue requirements on a net present value basis of at least \$300 million. The overall impact of synergies will tend to offset the adder through operational efficiencies so that

ratepayers will be providing an equivalent of a return on \$2.0 billion. The calculation of the ROE ceiling based on the forecast of PSNH's financing (Schedules in Volume II of NU's initial filing) indicates that the net income return on equity, cumulative net present value (NI ROE--CUM NPV) will provide low returns in the early years of the fixed rate period and higher returns in the later years as shown by the following schedule:

<u>Year</u>	<u>NI ROE--Cum NPV</u>
1990	0.53%
1991	4.39%
1992	6.40%
1993	7.69%
1994	9.15%
1995	10.42%
1996	11.75%

It will be noted that the NI ROE CUM NPV is 11.75%, or less than the 13.25% ROE required to trigger a rate decrease.

ROE Floor

The ROE floor protects ratepayers

against significant increases in base rates over the fixed rate period by guaranteeing NU a return on only the first \$2 billion of its total \$2.3 billion investment. The risk associated with the return on acquisition price in excess of \$2 billion in effect is transferred to NU investors by reducing the acquisition price by \$300 million through elimination of the Investment Adder. For purposes of the floor calculation the ROE is computed based on a \$2.0 billion investment. This hypothetical ROE would then be measured against the "nominal" floor trigger points of 8% in 1993, 9% in 1994, 9.75% in 1995 and 10.5% in 1996 to determine if the 5.5% increased rate level should be further increased; the CUM NPV ROE for floor is 14.78% in 1993, 15.56% in 1994, 16.12% in 1995 and 16.72% in 1996. Rodier Att. 2, p. 6, Staff Ex. 1. The

"nominal" floor trigger points do not activate an increase above the floor, since they are measured against a hypothetical ROE assuming the acquisition price for PSNH was \$2.0 billion instead of \$2.3 billion.

PSNH's actual ROE measured against total investment would be considerably lower than the "nominal" ROE. "Effective" trigger points based on PSNH's earned return on its entire investment of \$2.3 billion would be (0.3%) in 1993, 0.8% in 1994, 1.8% in 1995 and 2.8% in 1996 prior to triggering additional rate increases. Att. 2, p.3, Staff 1; Case 9, Ex. 6, Case 10, Ex. 6, Staff 4.

Staff's low growth forecast (Staff Ex.6) and staff's conservation and load management case do not project a rate increasers a result of the decreased net income level as shown by the following

tabulation: (p.11, Staff Ex.4)

<u>Year</u>	<u>Effective Floor</u>	<u>Low Growth</u>	<u>CLM</u>
1990		.53%	.53%
1991		2.69	2.47%
1992		4.37	3.72
1993	-.27%	5.46	4.56
1994	.81%	6.73	5.79
1995	1.77%	7.776	6.92
1996	2.84%	8.90	8.28

Base Rate Modifications under Section 5(a)(v)

Other than the annual 5.5 percent increases and any changes due to the operation of the ROE Collar, the only changes to base rates permitted by the Rate Agreement would be pursuant to Section 5(a)(v) as follows:

- (A) legislative or regulatory changes such as changes to federal or state tax or environmental regulations that require capital expenditures of at least \$20,000,000 or an increase or decrease in annual expense of at least \$2,000,000 (To the extent not otherwise covered in "EA" of FPPAC).
- (B) changes required by the Nuclear Decommissioning Financing Committee in the level of monthly payments. (to the extent not otherwise covered by Section 8 of the Rate Agreement,

page D-17).²

- (C) revenues to accomplish programs mandated for Stand-alone PSNH or NUNH by legislators or regulators.
- (D) costs associated with Conservation and Load Management programs that have been undertaken with the specific approval of the New Hampshire Public Utilities Commission.

To the extent any new accounting standards or rules are promulgated during the Fixed Rate Period Stand-alone PSNH shall be entitled to the same general rate treatment accorded to other New Hampshire utilities by the New Hampshire Public Utilities Commission for such new accounting standards or rules Ex. NU 1-E

² Ex. NU 23, Joint Recommendation for Commission order between the State of New Hampshire and NU filed June 22, 1990 at 1-2. Said Joint Recommendation and its companion "Second Joint Recommendation to the Commission" (filed by the State and NU with the original Joint Recommendation) and the Staff response thereto dated June 27, 1990 are attached to this report as Appendix A.

at D-13 to D-14; Ex. NU 3-I at 1.

During the course of the hearings, a number of important issues emerged regarding the interpretation and implementation of base rate adjustments under Section 5(a)(v) of the Rate Agreement:

1. "EA" of the FPPAC formula Ex. NU 1-E at D-103 as defined on page 13 of Exhibit C appears to substantially overlap with the provisions of Section 5(a)(v)(A) above, with regard to recovery of safety and environmental backfits raising at least the theoretical possibility of a double recovery, but in any event creating ambiguity as to recovery of certain expenditures, such as Merrimack SO2 scrubbers. Ex. Staff 1 at 19.

2. With regard Section 5(a)(v)(A) and EA of the FPPAC formula it is not clear what capital expenditures are recoverable if they are discretionary and undertaken voluntarily. It is clear that mandated expenditures over \$20 million are recoverable, but is not clear whether a voluntary expenditure of over \$20 million is recoverable or whether NUNH would be willing to voluntarily undertake expenditures of less than \$20 million since they are not recoverable, even if such an expenditure would be the least cost option. NU's financial motivation may be to undertake only those project that require capital expenditures greater

than \$20 million or that involve cleaner, more expensive fuels that can be recovered under FPPAC on a dollar-for-dollar basis. (Id. at 19 and 20)

Moreover, the potential impact of Section 5(a)(v)(C) is also not clear. For example, NU could argue that a capital expenditure of less than \$20,000,000 stemming from a legislative or regulatory change is recoverable under Section 5(a)(v)(C) ("revenues to accomplish programs mandated for Stand-alone PSNH or NUNH by legislators or regulators.

3. Under Section 5(a)(v)(D), the "cost" of conservation and load management (C&LM) programs is fully recoverable. The term "cost", however, is not defined by the rate agreement. NU stated repeatedly during the hearings that it contemplates such "costs" to include not only direct costs (e.g., material and labor associated with installing a water heater wrap) but also a revenue erosion allowance to offset lost sales and a financial incentive. Many of these programs may also be in the best interest of NU's stockholders to the extent that they help forestall conversions from electricity to substitute fuels for end uses such as water heating. Id. at 20.

4. According to NU, not only is C&LM implementation contingent upon the following cost recovery, the rate agreement also proposes to allow NU to add such costs to the ongoing base rate level which is subject to the 5.5% annual increases. This would result in NU's stockholders benefitting

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additionally (including the financial incentive) due to the compounding effect of the 5.5 per cent annual increases on the initial amount of C&LM cost recovery. Id. at 21

The framework for our evaluation of each of the issues arising under Section 5(a)(v) is whether the risks have been fairly apportioned and whether the interests of ratepayers have been properly balanced. The Staff concurred in the Joint Recommendations³ of NU and the State, appended hereto, with the exception of limiting the commission's authority to impose additional substantive conditions. The commission adopts the Joint Recommendations and its

³Ex. NU-23, Joint Recommendation for Commission order between the State of New Hampshire and NU filed June 22, 1990 at 1-2. Said Joint Recommendation and its companion "Second Joint Recommendation to the Commission" (filed by the State and NU with the original Joint Recommendation) and the Staff response and concurrence thereto dated June 27, 1990, are attached to this report as Appendix A.

proposed remedies and finds that incorporating the recommendations as part of its report will fairly apportion risks and properly balance the interests of investors and ratepayers in implementing the Rate Agreement. However, the commission reserves its right to impose such substantive conditions as may be necessary to serve the public good.

Recovery of Safety and Environmental Backfits Under "EA" of FPPAC

Staff recommended that the language of Section 5(a)(v)(A) should be modified to make it clear that the annual cost of safety and environmental backfits will not be recovered under Section 5(a)(v)(A) but rather under the term "EA" of FPPAC, in order to eliminate any hypothetical double recovery or confusion and ambiguity as to which provision is applicable. Ex. Staff 1-C,

Recommendation No. 11a.

NU and the State have proposed that, to the extent that Section 5(v)(A) of the Rate Agreement allows recovery for the cost of compliance with environmental orders, regulations, and laws, its should be interpreted to apply only to such costs incurred in connection with PSNH's non-production facilities. All such costs incurred by PSNH for production facilities shall be recovered through FPPAC, pursuant to the definition of the term "EA". Joint Recommendation at @6(i)

We find that staff's recommendation has been satisfactorily addressed. Moreover, the proposal does not solely address the relatively innocuous "double recovery" issue discussed by NU in its Brief at 76. It also remedies two other very substantial staff concerns discussed infra.

Implementation of Least Cost Measures

Staff recommended that PSNH implement least-cost measures without an NHPUC mandate in order to counteract the strong disincentive under Sections 5(a)(v)(A) and (C) of the Rate Agreement to voluntary implementation of least cost capital expenditures of greater or less than \$20 million since they are not recoverable under either provision. Ex. Staff 1-C, Recommendation No. 11b.

In response NU and the State have recommended the following:

The parties acknowledge that the intent of the Rate Agreement is that neither PSNH nor ratepayers should assume the risks or costs (beyond the requirements of Section 5(v) of the Rate Agreement) from any determination made by PSNH as to whether or not to pursue least cost measures. Toward that end, and consistent with the parties' desire not to exceed the projected rate path, the parties agree to cooperate in achieving their mutual goal by recommending, as needed, innovative mechanisms to permit

rate stability and implementation of least-cost measures without adversely affecting the financial assumptions upon which the Undersigned Parties relied in agreeing to the 5.5% percent rate path. Such innovative mechanisms could include retention by PSNH of any fuel expense savings until the capital costs incurred by PSNH for such measure are repaid. . .

Joint Recommendation at @6(ii).

The foregoing proposal of NU and the State may be irrelevant to the extent it appears to contemplate recovery of fuel switching expenditures under Section 5(a)(v) since costs related to fuel switching are clearly designated by the Rate Agreement for recovery under EA of FPPAC, not Section 5(a)(v). We will also state our understanding of the Rate Agreement that the types of costs recoverable under Section 5(a)(v)(A) and Section 5(a)(v)(C) are mutually exclusive. For example, a capital expenditure of less than \$20 million

selected by PSNH as its least cost option in response to a generic legislative or regulatory change would clearly not be recoverable under Section 5(a)(v)(A) and would also not be eligible for recovery under Section 5(a)(v)(C). The types of costs recoverable under Section 5(a)(v)(C) would be only those associated with new programs specifically mandated hereafter for PSNH.

Neither the cost of safety and environmental backfits under the term "EA" of FPPAC (Joint Recommendation at 6(i)), nor least cost expenditures of less than \$20 million mandated by the NHPUC can be recovered by NU, since there is no provision under "EA" of FPPAC comparable to Section 5(a)(v)(C).

Effect of Compounding 5(a)(v) Base
Rate Adjustments by the 5.5% Annual
Increases

Staff recommended that rate

adjustments authorized under Section 5(a)(v)(A) through (D) should not increase the ongoing base rate levels which are subject to the 5.5% annual increases. Ex. Staff I-C, Recommendation No. 12. In response, NU and the State have proposed that all incremental C&LM costs recovered under Paragraph 5(a)(v)(D) of the Rate Agreement in one year shall be increased by NU by 5.5% annually for the remainder of the fixed rate period. The intent of this proposal is that compounding of the 5.5% increases in allowed C&LM costs will be matched by corresponding increases in C&LM expenditures and will not be retained by PSNH as income. Joint Recommendation at @7(ii).

This proposal satisfactorily addresses the problem of compounding C&LM expenditures. In addition, the Joint Recommendation at @6(i) which provided

for recovery of environmental and safety backfits through FPPAC rather than base rates eliminates the compounding effect of the 5.5% annual rate increases on these expenditures and thus reduces the ultimate impact on customer rates.

Threshold Level of C&LM Expenditures
and Recovery of Lost Revenues

Staff recommended that NU undertake threshold C&LM activities consistent with least cost integrated resource planning principles within the 5.5% rate projections. According to staff, C&LM has an essential role to play in prudent utility management and it is expected that NU will do that C&LM necessary to comply with existing commission orders without awaiting further commission approval or mandate. NU should obtain the approval it needs for additional cost recovery for C&LM (e.g., lost revenues)

in a proceeding separate from DR 89-244.
Ex. Staff 2A.

In response, NU and the State have proposed that if the commission orders PSNH to implement any C&LM programs in excess of the base level included in the current projections for the Rate Agreement, PSNH shall be entitled to recover fully the sum of any and all incremental direct program costs. In addition, PSNH shall be entitled to recover fully all other costs (including lost fixed costs) and incentives related to C&LM programs only as may be permitted either in this or any other commission proceeding. Joint Recommendation at @7(i).

The NHPUC staff agreed to use its best efforts to facilitate the issuance of a report and order of the commission in docket DR 89-187 relating to cost recovery and incentive for C&LM on or

before the issuance of a report and order in this docket. Joint Recommendation at @7(ii).

The base level for C&LM programs included in the current base rate projections for the rate agreement are the programs approved by the commission totalling approximately \$1.167 million in annual 1989 costs to PSNH. Rate WI and other interruptible program costs (which in 1989 had cost approximately \$750,000 of the \$1.167 million) shall be recovered as Purchased Capacity Expense under FPPAC. Joint Recommendation at @7(ii).

We find this reasonable given that the design and costs of the Rate WI programs is uncertain and that \$1.167 million is a more appropriate level for other C&LM programs to be included in the base rate projections than \$400,000 (\$1.167 million minus \$750,000).

Load and Resource Plan

In section 3(d), the Rate Agreement states that "prior to the First Effective Date, NU will file with the NHPUC for its approval a load and resource plan for a period of 20 years reasonably demonstrating that the ratepayers of New Hampshire will be provided with safe and adequate electric service at just and reasonable rates." (NU 1-E, p. D-10) In compliance with this section of the Rate Agreement, NU filed a Twenty Year Forecast of Loads and Resources, Ex. NU 4-C on January 24, 1990.

NU states in its Brief at 82 that it has presented evidence that "[t]he Twenty Year Resource Plan demonstrates [its] ability to provide concrete, reasonably priced generation supply options to PSNH over the next twenty years, whether or not Seabrook operates. Ex. NU 4-C at 5-13; Ex. NU 4 at 23-62; Ex NU 4-A; Tr. Apr. 11 at 184-204; Ex. NU 8, HSTAF01 Q-

Staff-0%; Ex. NU 9, HSTAF01 Q-OCA-007, 008, 009. In its request for findings, NU avers that the commission can approve the Twenty Year Load and Resource Plan in accordance with section 3(d) of the Rate Agreement if it finds "that the 20 year Load and Resource Plan submitted by NUSCO provides adequate assurances that NU will have available sufficient supply side options at reasonable cost to meet the energy needs of New Hampshire for 20 years." (Requested findings, p.2) NU further argues that the Load and Resource Plan "demonstrates that PSNH will be able to conduct effective least cost planning pursuant to New Hampshire law by giving PSNH access to sufficient, attractively priced generation supply options." (Brief at 83).

Staff testified that "the NU Twenty Year Forecast of Loads and Resources demonstrates that there are adequate

resources to meet both PSNH's and the Combined System's needs for the ten year term of the rate plan." Ex. Staff 2A at 8; Ex. Staff 2 at 34-36; Tr. May 1 at 171-173; Tr. May 3 at 114-116. However, with respect to section 3(d) of the Rate Agreement and the nature of the commission approval required by that section, staff noted that "Nu has acknowledged that the Twenty Year Forecast of Loads and Resources is not a least cost resource plan and does not meet the commission's requirements for least cost planning." Ex. Staff 2A at 9. Further, staff testified that it believed that

"resource planning in accordance with the principles of least cost planning requirements is necessary to establish that any rates that result are just and reasonable ...Therefore, [it] recommends that the commission indicate in any approval of the load and resource plan that the approval goes to the extent that the load and resource plan

demonstrates that there are sufficient resources to meet PSNH's needs, but not to approval of specific resources at this time. The commission should make it clear that NU needs to comply with the commission's least cost resource planning requirements during the rate plan period and beyond in order to demonstrate that rates will be just and reasonable".

Ex. Staff 2A, Summ. at 9.

The issue before the commission is whether the Twenty Year Forecast of Loads and Resources filed by NU "reasonably demonstrate[s] that the ratepayers of New Hampshire will be provided with safe and adequate electric service at just and reasonable rates" so that the commission approval required by the Rate Agreement at section 3(d) can be granted. The Load and Resource Plan is not a least cost integrated resource plan. NU notes that "[a]ll the parties have repeatedly stated that the "Twenty Year Resource Plan does not relieve PSNH from New Hampshire's

least cost planning requirements." (Brief at 82) The commission accepts this commitment by NU to abide by our existing and any future least cost planning requirements. Therefore, it is left to us to determine whether the showing of adequate capacity resources in the Twenty Year Load and Resource Plan along with NU/PSNH's commitment to plan in accordance with least cost planning requirements is sufficient to demonstrate that ratepayers will be provided service at just and reasonable rates.

The Joint Recommendation for (@ 10) suggests that if is sufficient. NU/PSNH and the State recommend that section 3(d)

"be interpreted consistent with the intent of the parties negotiating the Rate Agreement that the 20 year load and resource plan filed by NUSCO provides adequate assurances that NUSCO will have available sufficient supply side options at reasonable cost to meet the energy needs of New Hampshire for 20 years. Further, the Commission's acceptance of the 20 year load and

resource plan shall not relieve NUSCO from its obligation to implement least cost planning as specified by the Commission, or limit, in any way, the right of the Commission to set just and reasonable rates."

Joint Recommendation at 6. We find that this interpretation of Section 3(d) is in fact necessary. The Twenty Year Load and Resource Plan as filed does not provide a sufficient basis for finding that the rates which result will be just and reasonable. In order to make such a finding, we will require NU/PSNH to comply with all existing and any future least cost integrated planning or any other resource planning requirements of the commission.

In addition, our approval of the Twenty Year Load and Resource Plan should not be interpreted to be a finding now that the capacity outlined in that plan is priced at market rates. Such a finding can only be made in the context

of PSNH's ongoing resource planning and our review of its in PSNH's least cost planning filings.

NU's Sales Forecasts

NU forecasts electricity sales to grow at a compound annual growth rate of 2.7% per year between 1988 and 1998, covering the period of the rate plan. Ex NU 3, The NU Sales Forecast for PSNH, 1988-89, p. 45. The corresponding compound annual growth rate for 1990 through 1996, the period of the 5.5% projected rate increases, is 2.3%.

NU forecasted sales by assuming that sales are equal to the economic trends, multiplied by the kilowatt hours (kWh) per unit of the economic driver, multiplied by the cumulative price effect, minus supply switching [(the economy x kWh x price) - (supply switching)]. Ex. NU 3, The NU Sales Forecast for PSNH, 1988-98, p. 2.

NU used forecasts of economic and demographic trends for New Hampshire from a variety of sources including "Data Resources Incorporated (DRI) Regional Information Service (RIS) Summer 1989 forecast for the State of New Hampshire".

Ex. NU3, The NU Sales Forecast for PSNH, 1988-98, p. 2. The DRI RIS forecasts were adjusted upwards by DRI at NU's request to correct what NU saw as inconsistencies. Nu response to Q-Staff-204

The cumulative price effect was derived from price elasticities that were adjusted from PSNH estimates. NU halved elasticities presented by PSNH in its 1989 Edition Load Forecast after comparing them to elasticities from other sources including DRI and Arthur D. Little (ADL). Ex. Nu 3, The NU Sales Forecast for PSNH, 1988-98, p.3.

Lastly, NU estimated the amount of

supply switching (self generation and cogeneration) that would take place under various price scenarios and incorporated an estimate, corresponding to its price projections, into the sales forecast. NU assumed that it would be able to make some rate design changes for what it called "vulnerable" customers. (NU response to Q-TSR007)

Staff expressed the concern that the uncertainties in NU's sales forecast for PSNH all work in the direction of leading to an overestimation of sales rather than counterbalancing each other. (Ex. Staff 2, p.5) Staff questioned NU's upward adjustments to the DRI RIS economic and demographic forecasts, NU's adjustment to PSNH's price elasticity estimates and NU's assumptions about rate design changes and self and cogeneration. (Ex. Staff 2, pp. 4-20) While staff concluded that the NU sales forecast was not

unreasonable, it was concerned that it might be optimistic. An overly optimistic sales forecast could threaten the financial viability of the rate plan and lead to additional rate increases for customers.

NU responded by arguing that it has established the reasonableness of its sales forecasts and points out that "NU and its investors, not New Hampshire ratepayers, bear the risk of optimistic sales projections over the Fixed Rate Period. . . unless the floor of the ROE Collar is triggered." (Brief at 90) Both Staff and NU testified that it was unlikely that the floor of the ROE Collar will be triggered even under a low sales forecast scenario. Ex. Staff 4, Response to Q-Staff 154.

NU has stated that "the primary determinant of sales growth is economic growth in New Hampshire, which is

essentially independent of electric price" Brief at 91. NU has adjusted the DRI economic and demographic forecasts to be consistent with a manufacturing employment forecast it believes to be accurate. Staff has expressed its concern that manufacturing employment may not be the key driver for nonmanufacturing employment, and hence population growth, and that NU's adjustment may not be appropriate. Staff Ex. 2 at 9. We note further that NU has assumed steady growth in nonmanufacturing employment and population even when growth in manufacturing is projected to fluctuate, remaining virtually flat in some years, declining in others and increasing in some. Ex. Staff 2, Attach. JGB-1, pg. 1 of 4.

NU has also incorporated rate design changes in the PSNH sales forecast to protect "vulnerable" customers. At the

same time, NU argues that its sales forecast is not "overly dependent" on its assumptions about rate design. Brief at 91. However, both the BIA and NU testified that it was important that NU/PSNH be able to make some rate design changes. Ex. BIA 1, p. 17; Ex. NU 3, The NU Sales Forecast for PSNH, 1988-89, p. 3. The rate design assumptions NU has actually incorporated into the sales forecast for PSNH do not appear to have much impact as NU has modeled them: overall sales increase slightly if revenue reallocation is precluded and no additional self or cogeneration is assumed. NU responses to Q-TSR-004. Nevertheless, we find it important to investigate rate design further and order the company to consult with staff and propose a schedule for a rate design

proceeding by January 1, 1991.⁴

Our greater concern, however, is with NU's price elasticity assumptions and its use of them. NU argues that "it should be stressed that real electric prices are relatively flat under the Rate Agreement" (Brief at 91) and in a footnote at p.21 states that it "believes ratepayers understand the difference between real and nominal prices". This commission does not need to determine the question of whether ratepayers respond to real or nominal prices. At least in the

⁴The commission is constrained by RSA 362-C:8 which provides: Notwithstanding any law or rule to the contrary, during the fixed rate term of the approved agreement or plan the commission shall not cause the allocation of base rate revenue responsibility among residential, commercial, industrial and municipal customers in effect on September 15, 1989, for the electric customers, serviced by Public Service Company of New Hampshire or its successor, to change without legislative approval of the commission's finding that such revenue responsibility allocation is unjust or unreasonable.

short term, ratepayers respond to the prices they see on their bills. In this situation ratepayers will be responding to a series of known price increases over a period of seven years. It is acknowledged that these price increases will exceed the projected rate of inflation, if only by a small amount. the commission's concern is with the magnitude of ratepayer response to these price increases during the seven year period and with the nature of ratepayer response at the end of this seven year period. It seems clear that seven years of known price increases should have some cumulative effect.

The results of the BIA's survey of New Hampshire's businesses and industries for their reactions to electricity price increases supports the conclusion that there is a threshold effect in responses to long term price increases. Ex. BIA-1.

Businesses and industries, as well as residential consumers, will make decisions on the purchases of equipment and appliances and the design of buildings and heating and process systems which may last beyond the seven year period of the rate plan. To the extent that price increases trigger such customer investment decisions, these sales are lost to the PSNH system for the life of those investments. Steady price increases known over a period of time which drive customers from the system may result in discontinuity of demand that does not reverse itself in equivalent fashion when prices stabilize. We are facing a path of sustained price increases above the rate of inflation. Failure by PSNH to recover its lost sales when these price increases end will have an impact on rates beyond the seven year period of 5.5% increases and on PSNH's

financial health.

Despite the concerns that have been raised about the implications of errors in the forecast, we note that no party has argued that the NU sales forecast for PSNH is within the bounds of reasonableness, but we believe it is at the upper end of those bounds.

C. FUEL AND PURCHASED POWER ADJUSTMENT CLAUSE

Description of FPPAC

The purpose of FPPAC, which will be in effect for ten years after the First Effective Date, is to eliminate the risk that volatility in fuel and purchased power expense could jeopardize the financial condition of Reorganized PSNH or alternatively result in a windfall to the company. FPPAC countervails these risks through the timely, adequate recovery from or refund to ratepayers of changes in fuel and purchased power

expense, without a change to base rates.

The base reference level to be used for the FPPAC has been designed so that there would be no revenues generated during the fixed rate period under the mechanism if the financial and economic assumptions on which the Rate Agreement was based were to occur. Under the terms of FPPAC, PSNH will recover or refund the difference between its actual fuel and purchased power costs and the projected base reference amount of those costs used to set base rates. Ex. NU 1-E at D 91-106. The following costs and expenses are recoverable under FPPAC:

- Energy expenses and changing fuel prices
- Purchased capacity and transmission expense
- Reductions to Small Power Producer/Cogeneration payments
- Hydro-Quebec support payments
- Seabrook Power Contract payments
- Cost of NHEC Seabrook Buyback Agreement
- PSNH's share of NEPOOL interchange expenses net savings

-Cost of Environmental Safety
Backfits, fuel switching or other
mandated improvements which require
a capital expenditures of
\$20,000,000 or generate an
increase or decrease to annual
expense of \$2,000,000.

Ex. NU 3I at 2.

Each December and June, the company would file for an FPPAC rate effective for the next six months, beginning with January and July, respectively.

FPPAC will replace PSNH's current adjustment mechanism (ECRM) and reconciliation from prior ECRM periods may affect FPPAC's first period calculation. There are two major differences between FPPAC and ECRM. One is chiefly a difference in form while the other is a difference in substance.

The difference in form is that the two mechanisms work in different ways to accomplish the same goal, the recognition of actual expense incurred. FPPAC examines total expense and applies a

surcharge or surcredit (i.e., the FPPAC rate) to base rates so that the sum of the two components of revenue, FPPAC adjustment and base rate reference level, reflects the actual expense incurred. In contrast, ECRM acts as an integral component of base rates that adjusts base rates to reflect the actual expense incurred. The FPPAC method is desirable following the reorganization of PSNH because the fluctuations in base rates that would result under the ECRM approach are not compatible with the fixed schedule of seven annual base rate increases established by the Rate Agreement.

The substantive difference between FPPAC and ECRM is that FPPAC takes into account non-energy costs that ECRM did not consider, such as purchased capacity expense and the Seabrook Power Contract, in order to make its operation more

compatible with the principles and requirements of the Rate Agreement.

FPPAC addresses several major contingencies. As noted above in the Base Rate Modification Section, if there are environmental backfits, safety backfits or fuel switching capital expenditures required that involve at least a \$20 million total investment or that cost at least \$2 million annually, the annual costs will be included for recovery in FPPAC. There are also deferral mechanisms designed to maintain the annual 5.5% rate increases provided for in the Rate Agreement. These mechanisms specifically address the renegotiations of certain of the small power producer (SPP) contracts, the possibility of premature retirement of Seabrook during the fixed rate period and negotiations with the New Hampshire Electric Cooperative (NHEC).

The FPPAC base has been designed to reflect current SPP contract rates. The FPPAC formula provides that customers will receive 90 percent of any reduction in the cost of power from the eight designated SPPs and 100 percent of any cost reductions from the remaining SPPs. Thus, if the renegotiations are unsuccessful, there would be no additional impact on rates resulting from the higher cost of power under existing agreements.

In the event Seabrook operates commercially, but is prematurely retired, the combination of replacement power costs and continuing payments under the Seabrook Power Contract might lead to rate adjustments under FPPAC during the fixed rate period that cause total rate increases in a particular year to exceed 5.5 percent. The deferral mechanism prevents this during the fixed rate

period by limiting the amount of these costs that can flow through FPPAC.

In the event that a combination of events relating to the SPP contracts, NHEC arrangements and premature Seabrook retirement would result in a total rate increase in a particular year of more than 5.5 percent, an additional deferral mechanism will defer such amounts as required to bring the rate increase down to the 5.5 percent level. Ex. NU 1-E B(K) at p. D 102.

Analysis of FPPAC Issues

There were five issues relating to FPPAC that emerged during the hearing: the reasonableness of the assumptions underlying the FPPAC BA reference level, interest on over and under recoveries and a trigger mechanism, off-system purchases, sales and exchanges, rate effects of negotiations with NHEC and the SPPs, and the Seabrook Power

Contract.

Reasonableness of the Assumptions
Underlying the FPPAC BA Reference
Level

In order to design a viable cost recovery mechanism that would protect both PSNH and ratepayers over the fixed rate period, it was necessary to define and project a baseline fuel and purchased power cost reference level using the best data available at the time. Staff and OCA asserted that some of these reference level assumptions may be overly optimistic. Staff recommended that the FPPAC be modified in order to allow the recovery of Seabrook O&M costs exceeding FPPAC assumptions only if Seabrook exceeds performance expectations (Ex. Staff 113, Recommendation No. 9), and the OCA extended this concept to other synergies that affect costs recovered through the FPPAC. Ex. OCA 1, Talbot Pre-filed Direct Testimony at 10.

However, it is important to note that, in the event the assumptions underlying the FPPAC BA reference level are realized in the aggregate (individual assumptions may well vary so long as they are offset by other charges) over the life of the FPPAC, the FPPAC mechanism would result in no change to ratepayers' bills. BA is the base assumptions for FPPAC costs included in the 5.5% rate increases. It appears that the cost assumptions incorporated in the FPPAC, taken as a whole, were reasonable when they were first negotiated and continue to balance utility and consumer risks. Upon extensive evaluation, we find that the assumptions underlying the FPPAC BA, taken in their entirety, are reasonable and stabilize prices for electricity to maintain the projected reasonable rate level found by the commission to balance investor and consumer interests.

Interest on Over and Under Recoveries
and Trigger Mechanism

Staff recommended, and NU agreed, that the commission add to the FPPAC mechanism provisions for interest on over and under FPPAC recoveries, and a trigger mechanism to allow for mid-course changes to FPPAC rate adjustments. Ex. Staff iB, Recommendations Nos. 5a and 5b. Joint Recommendation at @3. These recommendations do not affect ratepayers and investor risk allocations, and do not change the structure of the FPPAC or its baseline assumptions. According to Nu they would not require NU to go back to the Legislature, PSNH equity security holders, unsecured creditors or the Bankruptcy Court for approval.

We find that these recommendations serve the interests of both ratepayers and investors. We also note that interest on over and underrecoveries not

only keep ratepayers and investors whole when actual costs diverge from the FPPAC rate being billed, but also have the benign effect of encouraging the estimates on which the FPPAC rate is based to be as objective as possible, since there is no incentive for an inflated FPPAC rate resulting in an "interest free" loan from ratepayers.

Off-System Sales, Purchases, and Exchanges

Staff and OCA pointed out two ways in which the Rate Agreement might be used to disadvantage PSNH ratepayers to the benefit of NU stockholders. First, because the FPPAC automatically passes all purchased power costs through to ratepayers while all capacity sales revenues go to stockholders, Staff was concerned that NU will have an incentive to sell PSNH short of capacity and then require PSNH to purchase power from NU.

Ex. Staff 1B, Recommendation No. 6. Staff and OCA also expressed concerns that the certain sales will increase energy costs to PSNH ratepayers recoverable under FPPAC. Id. at Recommendation No. 7. NU satisfied these concerns by agreeing that the FPPAC will be interpreted so that energy and power costs flowing through to ratepayers will not include (i) the cost of any purchase of capacity made in order to replace a portion of PSNH capacity sold that causes PSNH to be unable to meet its allocated capability responsibility or (ii) the incremental cost of energy required to replace energy from resources sold pursuant to capacity sales contracts entered into after the First Effective Date. Joint Recommendations at @4; Tr. May 25 at 86-89.

We find that the remedial actions taken by NU in accordance with the Joint

Recommendation at @4 to address the deficiencies pointed out by Staff and OCA are desirable and will result in substantial monetary benefits to ratepayers over the seven-year life of the rate agreement.

New Hampshire Electric Cooperative:
SPP Negotiations

According to NU, the rate agreement provides a flexible approach to addressing any result that may arise from negotiations between NU and NHEC concerning the so-called "Seabrook buy-back contract." Tr. April 18 at 141-42. Under Section 12 of the Rate Agreement, NUSCO has agreed to undertake its best efforts to renegotiate the buy-back arrangement with NHEC/ Ex. NU 1-E at D-20. Section 12 of the Rate Agreement expressly provides that when the result of those negotiations is finally determined, either the State or NUSCO may

reopen the Rate Agreement to address that result. This flexible approach was specifically intended to permit the commission to approve the Rate Agreement without having to resolve the buy-back issue. Tr. April 9 at 44-46; Tr. April 18 at 129-34. Moreover, Section 12 of the Rate Agreement provides that any successful renegotiation is subject to the approval of the commission. Ex. NU 1-E at D-20. Therefore, the rate agreement ensures that the State and the commission will determine both during the fixed rate period and thereafter whether the negotiated buyback arrangement serves the public good.

Similarly, Section 12 of the Rate Agreement provides that NUSCO will use its best efforts to renegotiate power purchase arrangements with certain SPPs. Ex. NU 1-E at D-20. The current PSNH rate projections do not assume any

reduced power purchase costs due to these renegotiations. Ex. State 1, Kessler Pre-filed Direct Testimony at 19-20. In the event such renegotiations provide for reduced purchased power costs, as noted above such cost savings will be shared pursuant to Rate Agreement Exhibit C, Paragraph B.D. Thus, successful SPP renegotiations can only serve to decrease rates.

We find that the flexibility built into the Rate Agreement regarding future negotiations with NHEC and the SPPs are desirable and a positive factor in the determination of the public good.

Seabrook Power Contract

PSNH currently owns approximately 35.6% of Seabrook.⁵ Absent the

⁵Connecticut Light and Power, an NU subsidiary, owns approximately 4% of the Seabrook Nuclear Power Plant, with the balance of the ownership distributed among 10 other joint owners.

Agreement, PSNH's share of the Seabrook costs could not be included in rates until it is actually providing service to customers pursuant to the so-called anti-CWIP statute RSA 378:30a, which provides as follows:

378:30-a Public Utility Rate Base; Exclusions. Public Utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

In light of the Supreme Court's holding in Petition of Public Service Company of New Hampshire, 130 N.H. 265 (January 26, 1988) that the so-called

anti-CWIP statute, RSA 368:30-a precludes inclusion of CWIP in rates even in emergency circumstances, the legislature passed RSA 362-C to authorize the commission to examine the rate agreement and determine whether, taken as a whole and in the context of the joint plan, it is "consistent with the public good." RSA 362-C:3. The legislature further directed that if the commission finds the rate agreement to be consistent with the public good, it shall,

"notwithstanding any other provision of law, establish and place into effect the levels of rates, fares, or charges in the fuel and purchased power adjustment clause to be maintained for Public Service Company of New Hampshire, or its successor, in accordance with, and during the time period set forth in, the Agreement... ."
[Id.]

Thus, to the extent that the commission finds the plan to be in the public good, it can implement the plan notwithstanding

such contrary provisions of law as RSA 378:30a, which would otherwise bar inclusion of Seabrook costs in PSNH's rates.

The reorganization plan provides that PSNH will maintain its current ownership of Seabrook after the First Effective Date and until the consummation of the merger. Ex. NU 1-E at 24. After the second effective date, when the PSNH merger with NU is consummated, PSNH will transfer its Seabrook interest to a newly formed NU subsidiary, referred to in the plan as NEWCO, but subsequently named North Atlantic Electric Company (NAEC). Once PSNH has transferred its Seabrook interests to NAEC, its rights and obligations to Seabrook power will be defined primarily under the terms of the Seabrook Power Contract which the commission is being asked herein to

approve. Id.

The Seabrook Power Contract was designed to minimize financing costs and to ensure the safe operation of Seabrook through NU management. Tr, April 11 at 64 and Tr. April 30 at 38-39. It also entitles PSNH to all of NAEC's share of the output of Seabrook in consideration of what has been described in this docket as a "bullet-proof" obligation to pay NAEC pursuant to a cost-of-service formula specified in schedule I to the Seabrook Power Contract.⁶ The contract provides that PSNH's obligations to pay

⁶The unit contract between PSNH and NAEC is in the record as part of Exhibit NU 1-E beginning at page D-29. The Schedule I, cost-of-service and termination costs, commences in the same exhibit at page D-62. Between the first effective date and consummation of the merger, PSNH can recover under the plan from its ratepayers the same amounts that PSNH would have had to pay to NAEC if the Seabrook Power Contract were in place. This was presented by NU as being an essential part of the financing arrangements. Ex. NU 1-E, at 24.

NAEC for Seabrook are, "absolute and unconditional and shall not be affected by any circumstances... ." Seabrook Power Contract, Ex. NU 1-E at D-39 - D-40. The Contract, with certain exceptions, thus requires PSNH to pay all costs associated with the NAEC Seabrook ownership share, and to assume all risks, regardless of whether such costs and risks are now foreseeable or unforeseeable, or whether Seabrook is operating. Testimony of Staff Witness Rodier, Ex. Staff-1 at 11.

There are several exceptions to and mitigations of this "unconditional" obligation of Seabrook to pay NAEC under the Seabrook Power Contract. One is that NAEC must seek the approval of this commission to incur additional costs at Seabrook in excess of \$200 million (above the initial \$700 million value attached to Seabrook), or if Seabrook is not operable by December 31, 19992. Id. at

12 and Rate Agreement, Ex. NU 1-E, Ex.D at D-4 and D-5. The Seabrook expenditure of the initial \$700 million and additional expenditures up to \$200 million are to be deemed prudent so long as they are incurred prior to December 31, 1992, or such later date as this commission approves. Ex. NU 1-E at D-97.

Second, the parties to the Seabrook Power Contract have agreed to waive their respective rights to seek any change in the cost of service formula and the components under the formula before FERC.

For example, in paragraph 12 of the Seabrook Power Contract, (Starting at Ex. NU 1-E at D-47) North Atlantic agreed not to unilaterally file under Section 205 of the Federal Power Act to change any rate or charge without the prior written consent of PSNH and the State of New Hampshire. The parties to the contract also waived any rights they may have to

file a complaint with respect to the rates charged under this Agreement or any other provisions of the Agreement pursuant to Section 206 of the Federal Power Act without the prior written consent of each of the other parties. The parties further agreed that the FERC shall not change the rates charged under this Agreement "unless such rate is found to be contrary to the public interest." Id.

A third exception regards PSNH's ability to recover Seabrook costs via the fuel and purchased power adjustment clause (FPPAC). FPPAC, designed under the Agreement to be in effect for ten years, is the vehicle for recovery of all of PSNH's Seabrook related expenses. Section BE(4) NU 1-E at D-98 of the FPPAC provides:

[T]he recovery of any and all costs which are the subjext of

this FPPAC with respect to payments to [NAEC] under the Power Contract will be subject to review by the NHPUC as to the prudence of their incurrence. [PSNH] waives any provision of law that would preclude NHPUC review of the prudence of Seabrook costs incurred by [NAEC] or [PSNH].

Thus, whether or not PSNH is obligated under the Seabrook Power Contract to pay NAEC for specific costs, the NHPUC will have the right to review the prudence of said costs to determine whether they should be passed on to ratepayers by operation of the FPPAC. This waiver is intended to preclude any dispute in future proceedings as to whether the imprudence of NAEC or the Seabrook operators can be imputed to PSNH for ratemaking purposes by this commission.

This right of the NHPUC to review the prudence of Seabrook costs was originally presented as a part of FPPAC

and thus would have ended with the expiration of the FPPAC after ten years.⁷ During the proceedings, staff established a concern, shared by the commission, that the waiver by PSNH did not extend for the full forty year life of the Seabrook Power Contract. NU subsequently, by stipulation with the State, agreed to extend the waiver to the full forty year life of the Seabrook Power Contract on condition that Seabrook costs will continue to flow through an adjustment clause in a manner "substantially identical to the recovery of such payments allowed under the fuel and purchased power adjustment clause."

NU also, as part of the Joint

⁷Paragraph 7 of the rx, Ex. NU 1-E at D-16 and D-17 provides that FAAPC shall expire at the end of 10 years, and, at the end of such 10 year period, the "cost of ... purchased power shall be recovered in the manner established by the NHPUC."

Recommendation extended the waiver of rights to NAEC in compliance with a recommendation by the staff and by the State. Although the commission is of the opinion that it has the authority to impute the imprudence of NAEC and Seabrook operator to PSNH for ratemaking purposes, this extension of the waiver of rights to include NAEC precludes the parties from challenging said authority in related subsequent proceedings.

The stipulation provides that the recovery through retail rates of

"any and all such payments made by PSNH under the Seabrook Power Contract will continue to be subject to prudence review by the NHPUC, except for the initial incurrence of the \$700 million dollar cost established for Seabrook as of the effective date of PSNH's reorganization and the additional costs, if an, relating to Seabrook, up to \$200 million incurred prior to December 31, 1992, in placing Seabrook in commercial operation. Id. at 2.

The term "prudent expense" was

defined in the original FPPAC,
(applicable only to expenses incurred
under the Seabrook Power Contract), as:

An expense that a reasonable utility management would have made, in good faith, under the same circumstances, and at the time the expense was actually incurred or at the time the utility became committed to incur the expense.⁸

In accepting this definition of imprudence as applied to the Seabrook Power Contract provision we construe it broadly so that the NHPUC may, under this definition, disallow all expenses incurred by PSNH as a result of an imprudent act in the operation or maintenance of Seabrook. For example, if an imprudent act in the operation or maintenance of Seabrook causes an outage

⁸Ex. C to the Rate Agreement, Exh. NU 1-E at D-98 and D-99. Prudence is not defined elsewhere in the Agreement and the commission is not bound to apply this definition except as it pertains to costs incurred under the Seabrook Power Contract.

of substantial duration, PSNH would lose the benefit of Seabrook power and would thus have to purchase relatively expensive replacement power and pay whatever cost it is obligated to pay to repair the damage at Seabrook and bring it back on line.⁹ PSNH may be precluded

⁹NU, in its trial brief at page 49, indicated, regarding a staff request that PSNH waive any claim of preemption that it may have concerning review of replacement power expenses attributable to Seabrook outages that are determined to be imprudent, that this "question was specifically addressed during negotiations with the State of New Hampshire and deliberately excluded from the waiver provisions of the FPPAC. Tr. May 23 at 72. In a recent filing with the commission, NUSCO discussed existing case law on this complex and unsettled question, and reserved the right, if the issue ever arises, to argue for an interpretation of law that would preclude disallowance of replacement power costs. ...However, no provision in the Seabrook Power Contract or the Rate Agreement, including the FPPAC, diminishes in any way the commission's existing powers with respect to such costs -- whatever authority the commission would have absent these agreements, it will continue to have." Id. In determining now that the commission has the authority under the Seabrook Power Contract to disallow costs

by the commission from recovering from its ratepayers any of such costs in excess of what they would have paid but for the imprudent act, including, inter alia, the incremental costs of replacement power and O&M expenses incurred as a result of the initial imprudent act. Replacement power during a prolonged Seabrook outage could be a substantial expense from which the commission should be able to shield ratepayers.¹⁰ The State and NU both

resulting from Seabrook outages that were caused by imprudent acts, we are not rewriting the Agreement but interpreting how it may be implemented in the public good in subsequent rate proceedings.

¹⁰Another alternative shield for ratepayers, would be for the commission, in subsequent proceedings, to consider, when appropriate, removing from rates a portion of the up to \$900 million initial investment in Seabrook, (considered prudent under the Agreement) under the used and useful principle (pursuant to inter alia, RSA 378:27, 28) in the event that imprudence at Seabrook should render Seabrook unusable and useless for an extended period of time.

asserted in these proceedings that the waivers of rights and establishment of NAEC were designed to retain current levels of NHPUC jurisdiction over PSNH and Seabrook. To construe the agreement of the parties otherwise would be render meaningless the reserved prudence review powers of the NHPUC.

We also hold PSNH accountable to take whatever actions are appropriate to avoid or recover any costs claimed by NAEC which may not be legally owing. NU agreed as part of its stipulation in Ex. NU 23 that the no "set-off" language in the Seabrook Power Contract would not foreclose any cause of action that PSNH would otherwise have against North Atlantic. NU Trial Brief at 48; Tr. May 25 at 77; Ex. NU 24. Although we recognize that PSNH's options in this regard are restricted by the Seabrook Power Contract, which defines PSNH's

obligation to pay as "unconditional", circumstance may occur which would justify legal or other action by PSNH to minimize said costs. Tr. Apr. 11 at 67-68; State's Legal Memorandum on the Seabrook Power Contract, Ex. NU 23 14. This is consistent with the Agreement, which provides that nothing contained in the "absolute and unconditional" language describing PSNH's obligations to make payments to NAEC "will prohibit Buyer (PSNH) from pursuing such other remedies as it may possess against Seller with respect to such amounts owed or claimed to be owed to Buyer." Seabrook Power Contract, Ex. NU 1-E at D-39 to D-40.

Although the financial viability of NAEC and PSNH is not ensured by the Seabrook Power Contract, the record supports a finding that even if Seabrook were canceled, both PSNH and NAEC would probably be financially viable. As long

as PSNH is able to make its payments under the contract, NAEC will recover its cost of service and a return of an on its investment in Seabrook. NU Trial Brief at 86 citing Ex. NU 5, Busch Prefiled Direct Testimony at 84 and 92-93. If Seabrook were canceled, PSNH could incur higher replacement power costs, to the extent that the commission allows such costs to be passed on to ratepayers, but PSNH could also accrue certain tax benefits from Seabrook more quickly thereby at least partially offsetting its payments to NAEC. Id.

Ratepayers benefit from the Seabrook Power Contract in several ways. The contract requires NAEC to sell to PSNH all of its entitlement to Seabrook while PSNH is obligated to purchase that entire entitlement. Tr.Apr. 9 at 143. As long as Seabrook remains operational, the contract offers power at competitive and

reasonable prices both in the short term and long term. Tr. Apr. 30 at 22-23. As mentioned above, the Seabrook Power Contract minimizes financing costs and addresses safety concerns. It also avoids rate shock by incorporating a qualified phase-in plan to account for the investment in Seabrook on NAEC's books. Tr. Apr. 9 at 143. In the event that Seabrook is canceled, the recovery of costs from PSNH ratepayers is nonetheless reasonable and compares favorably with the likely recovery under traditional ratemaking. Under current policy, FERC would probably grant 50% of prudent Seabrook investment over a 10 year period in the range of \$1.45 billion (1/2 of \$2.9 billion dollars) or \$700 million dollars (1/2 of \$1.4 billion) depending on the level of investment found to be prudent.

The Power Contract also allows

recovery of the Seabrook investment in 39 years rather than 10 years with a maximum recovery of \$700 million dollars out of a \$2.9 billion dollar investment by PSNH.

Staff and OCA recommend that the commission impose a performance incentive for Seabrook based upon availability, although staff ultimately indicated that such a provision is no longer necessary in its opinion for a finding that the agreement is in the public good. Ex. Staff 1B, Rec. 5c; Tr. May 25 at 70-71, 133-34, 206-12. NU strenuously objected to the imposition of a performance incentive mechanism regarding Seabrook because, inter alia, such performance incentives would alter "some very fundamental assignments of risk" under the agreement and "would not be permissible, even if NU were willing unilaterally to agree to it, which we are not. Additionally, Mr. Opeka stated such

a change would not be acceptable to the NRC." Ex. NU 3-K at 5-6, Tr. May 22 at 55.

We do not believe that a properly designed performance incentive would alter fundamental assignments of risk under the Rate Agreement. The achievement of the projected 5.5 percent rate track depends a large part on achievement of the Seabrook synergies and the establishment of performance incentives would be consistent with this goal. Also, the Agreement is structured so that even where PSNH must pay NAEC for certain costs, the commission has the authority to disallow said costs from being passed on to PSNH's ratepayers to the extent that they were imprudently incurred. Performance incentives are consistent with this authority.

NU's representation that such an incentive would "not be acceptable" to

the NRC is at best overstated if not inaccurate. NU substantially softened its assertion in this regard in its June 28, 1990, letter to the commission in which NU states:

[W]e certainly did not mean to convey to the New Hampshire PUC that the NRC in any manner prohibits the implementation of incentive programs. I think it is more accurate to say that the NRC Commissioners continue to have reservations about how such programs are fashioned and whether they provide incentives or disincentives to safe performance of nuclear power plants.

Ex. Staff 21 at 2-3

Nonetheless, we agree with staff that it is not necessary at this time to establish a performance incentive program for Seabrook as a condition to approval of the agreement. We may impose such a performance incentive program, however, if it appears in the future that the expected Seabrook synergies are not being achieved. We would do so only on finding

that performance incentives would be constructive in minimizing rate increases and improving efficiencies without compromising the Seabrook safety concerns.

On balance, the Seabrook Power Contract appears to be beneficial to New Hampshire ratepayers. Given the benefits of the contract cited above, including the scope of the continuing prudence review powers of the commission and the concessions by NU to extend its waivers of rights applicable to both PSNH and NAEC for the full 40 year period of the contract, the commission will find that the Seabrook Power Contract is in the public good. Although there remain substantial risks to ratepayers that rates could increase substantially if Seabrook does not go on line or if there is an extended outage, there are also substantial potential ratepayer benefits

under the contract if the Seabrook synergies are achieved and if Seabrook maintains a capacity factor of 60% or more. Given the record evidence that Seabrook is likely to attain commercial operation in the near future and maintain a capacity factor of 60% to 87%, we find that the potential ratepayer benefits under the Seabrook Power Contract outweigh the potential risks to ratepayers. We will accordingly approve the Seabrook Power Contract as being in the public interest.

D. INVESTMENT ADDER IS JUSTIFIED BY THE SYNERGIES

The Investment Adder is "the capitalized synergies, efficiencies or other cost savings or benefits brought by NU to the acquisition of PSNH, but not including any benefits resulting from general economic factors that would be applicable to any bidder for PSNH's

assets." Ex. NU 1-E at D-85 to D-86. The significance of the Investment Adder is restricted to the determination of whether the upper limit, or ceiling, of the ROE collar is reached, thereby requiring a base rate decrease. The floor of the ROE collar reflects a two billion dollar value of PSNH. The Investment Adder feature provides that the ROE ceiling must be determined as if the combined capitalization of PSNH and NAEC at the First Effective Date is two billion dollars plus the co-called Investment Adder of \$300 million dollars. NU Trial Brief in Support of Its Petition dated June 8, 1990, at 51-52, Ex. NU 1-E at D-85 to D-87; Ex. NU 3, Noyes Prefiled Direct Testimony at 15-16.

This differentiation between the value of PSNH at the floor of the ROE collar as opposed to its value at the ceiling was the result of a compromise

between NU and the State negotiators. The State negotiators were unwilling to allow recovery from ratepayers of more than \$2 billion and the creditors insisted on a value of \$2.3 billion to resolve the bankruptcy. NU witness Noyes described the situation in terms of a market transaction where "you had a bid of \$2 billion dollars and an asking price from the creditors of \$2.3 billion. And the negotiations were basically at an impasse." Tr. April 18 at 6. NU's position in the negotiations was that "...where we are a typically prudent investor we are not going to put money in that we can't earn a return on." Id. at 7. The State insisted that ratepayers should not be put at risk and thus offered that in order to support the seven consecutive 5.5% increases at the top of the ROE collar, NU would have to demonstrate to the commission that NU

brings a minimum of \$300 million dollars in additional value to PSNH that wouldn't be there on a stand-alone basis. Id. Thus, ratepayers are only at risk for a \$2 billion investment at the low end of the ROE collar while NU is afforded an opportunity to earn the maximum ROE on \$2.3 billion at the top end of the collar. Id. at 11; Ex. NU 1-E at D-23.

The plan provides that

"NU shall have the burden of justifying the Investment Adder amount in a proceeding to be held before the NHPUC to the extent the aggregate value of the Plan Value exceeds \$2 billion prior to the First Effective Date, there shall be no retrospective review and modification by the NHPUC of the Investment Adder amount for (PSNH) as determined in (this) proceeding."¹¹ (emphasis added)

NU has identified and quantified six categories of synergies that fit within

¹¹Ex. B to the Rate Agreement, NU 1E at D-86. The Investment Adder for PSNH is calculated under the formula set out in schedule 1 to Exhibit B found at page D-90 of Ex. NU 1E

the definition of the Investment Adder. These synergies include the Seabrook O&M expense synergy, the fossil-steam unit availability synergy, the energy expense synergy, the peak load diversity synergy, the A&G synergy and the coal purchasing synergy. The total synergies claimed by NU exceed \$515 million. The commission need only find, for purposes of establishing the Investment Adder, that a minimum of \$300 million dollars of synergies will accrue as a result of the NU merger with PSNH.

Seabrook Synergy -- Approximately \$188 Million

The agreement contemplates that, as part of NU's acquisition of PSNH, an NU subsidiary will assume the management and operation of Seabrook. NU's original estimate was that it could reduce, through its management of Seabrook, the O&M and A&G costs from the NHY budgeted

amount of \$157.5 million dollars down to - \$95 million dollars. After testimony from NHY witness Brown that NU underestimated various costs (in particular costs associated with the evacuation plan pertaining to Massachusetts communities within a 10 mile radius of Seabrook), NU increased its cost estimate to \$113 million a year. This revised amount is only \$2 million more than the PUC staff estimate of \$111 million. Mr. Brown of NHY indicated that he could not further reconcile NU's estimates with NHY's budget because NU organized its budget differently from NHY precluding Mr. Brown from performing "any meaningful analysis." Tr. May 25 at 7.

Commission analysis of the Seabrook synergy is further complicated by the fact that an in depth "bottoms up" analysis of Seabrook's cost and staffing requirements cannot be completed until

Seabrook achieves commercial operation and the operating license is transferred from PSNH to NU sometime beyond the close of these proceedings. The Joint Owners of Seabrook requested that NU not begin its more detailed study, referred to as a "one-on-one study", until after NHY has completed the critical phase of the power ascension of Seabrook so that the NHY employees can devote their full attention to their primary task.

The record evidence is sufficient, however, to support NU's revised claim that the investment adder component attributable to PSNH's share of the Seabrook O&M expense synergy will be approximately \$188 million dollars. The Joint Recommendation increased the assumed Seabrook budget amount under NU management from \$95 million up to \$113 million for 1991, escalated at 5.5% per

year thereafter.¹²

It further provides that the base assumption for nuclear fuel expense be reduced to reflect revised projections offsetting the increase in O&M expense described above of \$18 million (NU's revised Seabrook estimate of \$113 million minus NU's original Seabrook budget estimate of \$95 million). NU has thus increased its projected Seabrook budget to a more realistic level of \$113 million without increasing, on average, the assumptions underlying the 5.5% per annum rate increase projections. This agreement results in a net cumulative present value benefit of \$7 million additional

¹²Second Joint Recommendation of the Parties at 2. NU's projected Seabrook budget was increased from \$95 million to \$113 million to accommodate various differences between Seabrook and Millstone 3, including emergency planning costs, environmental monitoring costs, and costs of radiological monitoring, nuclear licensing, training and nuclear records. NU Trial Brief at 57-58.

protection against FPPAC related increases (Second Recommendation at 3), mitigating concerns expressed by the commission and various parties during these proceedings regarding the ability of NU to achieve the Seabrook synergy, especially during the first two years under the rate plan.

Achievement of the projected Seabrook savings depends primarily on NU aggressively pursuing its represented course of action to reduce Seabrook expenses to projected levels. The commission's Chief Engineer, Dr. Edward Schmidt, concluded that, based on his analysis of the currently available information, and assuming NU's best efforts, it is likely that NU will be able to achieve a Seabrook budget of approximately \$111 million, \$2 million better than NU itself predicts. Tr. May 3 at 65. NU has a record of excellence in

the area of nuclear operations and a commitment to meeting its public service in nuclear safety obligations while simultaneously seeking cost effectiveness. Ex. NU 7-B Opeka Rebuttal Testimony at 24. It is currently utilizing in-house capabilities to operate four nuclear plants demonstrating substantial economies by relying less heavily than does NHY on outside contractors. NU witness Fakonas indicated that the NU analysis is reliable to the point that he "would be extremely surprised" if the ultimate, more detailed, analysis resulted in a substantial change from the current projections. Tr. May 22 at 287. NU witness Opeka testified that the NU experience with Millstone 3, a comparable plant to Seabrook, provides further evidence that NU can operate Seabrook within the projected budget of \$113

million. See footnote 11, supra. NU's overall administrative capabilities lend further credence to their claims that Seabrook operation under NU management will result in a significant decrease in the O&M costs for Seabrook.

Based on the record evidence, we find that the cumulative net present value of the projected Seabrook synergy should approximate NU's contention of \$188 million.

Steam Unit Availability Synergy
--Approximately \$98 Million

This synergy represents the total savings that are expected to result when the average availabilities of PSNH's fossil steam generating units are improved to levels comparable to NU's fossil unit performance. By improving plant availabilities, NU projects two kind of savings totalling \$98 million:

1. Improved availability will reduce the total amount of

capacity that PSNH must support in order to meet its NEPOOL obligations. Ex NU 4 at 9-10.

2. Improved availability will also reduce the energy costs thereby displacing the need for the operation of more expensive generating units to meet PSNH's energy requirements.

Staff witness Schmidt challenged this synergy on the basis that, in his view, NU would bring only \$34 million in fossil steam unit availabilities synergies because the rest of the projected savings could be obtained by PSNH on its own. If we were to accept Dr. Schmidt's analysis, then we must set this synergy at \$34 million as opposed to NU's alleged \$98 million since a synergy, as defined in the plan, must be attributable to NU's management of the company. NU asked the commission to put more credence in its analysis than in Dr. Schmidt's analysis because Dr. Schmidt "relied on only one

year of availability data to project future performance (NU Trial Brief at 64) whereas NU utilized a full four years of data. The record is clear, however, that Dr. Schmidt utilized the same four years of data used by NU except in a form which Dr. Schmidt felt was more realistic than the averaging technique used by NU. Ex. Staff-3A, Summary of testimony of Dr. Edward J. Schmidt at 1. . NU correctly points out, however, that more recent data than was available to Dr. Schmidt would result in \$7 million in additional capacity related savings (Ex. NU 7-B, Opeka Rebuttal Testimony at 48) in addition to Dr. Schmidt's estimate of \$34 million. Ex. Staff-3B, Schmidt Revised Direct Testimony at 6-7.

More importantly, the commission agrees with NU's projections of Stand-alone PSNH's availability prospects and that the entire \$98 million of projected

savings should be attributed to NU's management of the company. NU has a history of achieving a capacity weighted average availability in excess of NEPOOL targets in each year that such targets have been in existence. Ex. NU 8, HSTAF01 Q-Staff-033. PSNH has historically fallen short of such targets. NU's programs, primarily through use of in-house resources, designed to minimize the number and duration of outages can, in combination with PSNH's expertise and resources, substantially improve the availability of PSNH's fossil steam units. We will accordingly assign the full value asserted by NU of \$98 million to the fossil steam unit availability synergy.

NEPOOL-Related Synergies --
Approximately \$146 Million

There are two kinds of NEPOOL-related synergies asserted by NU. The energy

expense synergy consists of the savings to PSNH, and ultimately to PSNH's ratepayers, that result from lower energy costs for the combined system under the NEPOOL agreement. Ex. NU 4, Sabatino Prefiled Direct Testimony at 12-15 and 49-59. NU projects total energy expense savings to PSNH of over \$109 million attributable to PSNH or NU being able to operate a relatively low cost generating unit as opposed to a relatively expensive generating unit that the other would have to run on a stand-alone basis. The savings are the difference in cost of operating the less expensive unit under the combined system and the cost that would have been incurred without the merger to operate the more expensive unit. NU Trial Brief at 67. These savings will be divided equally between NU and PSNH. Section 4 of the Rate Agreement at 7.3 of the Sharing

Agreement. Ex NU 4 Att. 1, Direct
Testimony Sabatino.

The second of the NEPOOL-related synergies is the peak load diversity synergy, projected by NU to be nearly \$37 million for PSNH. These savings accrue because the PSNH and NU system peaks fall at different times. For example, NU's summer peak and PSNH's winter peak partially offset each other thereby reducing their combined peak load, which in turn causes a reduction in the capacity that the combined system must support under the NEPOOL agreement, ultimately resulting in overall savings to the combined system.

The savings from the peak load diversity synergy, unlike the savings from the energy expense synergy which is divided equally between PSNH and NU, are divided so that one quarter of the capacity related savings would be

allocated to PSNH and 75% would be allocated to the initial NU system. Section 4 of the Rate Agreement, to be implemented pursuant to Section 3.3 of the Sharing Agreement. NU and the State argue that this 75%-25% allocation is appropriate since the amount of capacity a utility must support is a function of its peak load and the initial NU system's peak load is about three times that of PSNH. Staff initially took issue with the proposed 75-25 split and argued that the savings from the peak load diversities synergies should be divided equally between NU and PSNH as is the energy expense synergy. Staff subsequently qualified its concern, and the commission agrees, is that the 75-25 split of the peak load diversity synergy is mitigated by PSNH receiving 50% of the energy expense synergy. Given concerns expressed by Connecticut regulators that

each synergy should be divided 75-25, the relative divisions of savings appears to be a reasonable compromise reflecting the interests of both jurisdictions.

Staff witnesses expressed concerns that the synergies are not reliable because NEPOOL rules can be changed or other NEPOOL participants might combine causing increased costs to PSNH. The latter scenario could occur whether or not NU acquires PSNH and, given current NEPOOL rules, PSNH would still benefit from its affiliation with NU even though its savings would be diminished by other combinations of NEPOOL participants. It is also unlikely that the applicable NEPOOL rules will substantially change. NU Trial Brief at 68-70. Accordingly, we find that the Investment Adder component attributable to NEPOOL related synergies can be quantified at NU's projected \$146 million.

A&G Expense Synergy and the Coal
Purchasing Synergy -- Approximately
\$84 Million

These two remaining synergies consist of savings attributable to economies of scale derived from the combination of the two companies, the ability of the combined companies to obtain bulk purchasing discounts, NU's efficient and low cost management capabilities and operating efficiencies. NU projects A&G cost reductions in:

- o Reorganization of the existing PSNH Board of Directors
- o Elimination of certain expenses currently incurred by PSNH, including cost of preparing an annual shareholders report and other reports, holding an annual meeting and complying with proxy requirements established at approximately \$500,000 per year; and
- o The changes resulting from evaluation of potential staff reduction over time.

NU has presented credible evidence that these synergies can occur and

recommends that the commission accept the proposed values. NU's assertion in relating to these synergies are consistent with their experience in the initial system and there was no contrary evidence presented on the record. Accordingly, we accept NU's argument that the A&G expense synergy and the coal purchasing synergy will likely add approximately \$84 million dollars in value to PSNH as a result of its affiliation and merger with NU.

Total Projected Synergies

Based on the above analysis, we conclude that NU will bring at least \$300 million in synergies to PSNH as a result of the proposed acquisition and merger. Specifically, we find that NU, acting prudently, should be able to achieve the estimated savings attributable to Seabrook synergies of \$188 million dollars, the fossil steam unit

availability synergy of \$98 million, NEPOOL related synergies of \$146 million, and the A&G expense and coal purchasing synergies of \$84 million dollars, totalling \$516 million dollars in savings. Accordingly, we grant NU's request for an Investment Adder of \$300 million to the investment base of \$2 billion for purposes of calculating the ceiling of the ROE collar as being consistent with the public good.

The Importance of Synergies to Maintain Just and Reasonable Rates

The importance of synergies extends beyond the Investment Adder. Attainment of the savings levels attributed to the synergies by NU is essential to the maintenance of the 5.5% per year rate projections and reasonable levels of rates thereafter. Some of the synergies affect FPPAC and others affect the ceiling and floor calculations under the

ROE collar. Ex. NU 16. As discussed elsewhere in this report, it is unlikely that there will be any increase to base rates via a trigger of the floor of the ROE collar. Thus, much of the risk of failing to achieve those synergies which affect the ROE collar (i.e., the peak load diversity synergy, the PSNH A&G synergy and part of the fossil steam unit availability synergy) falls on investors. However, the risk of not achieving those synergies which affect FPPAC is borne by ratepayers. For the annual rate increases to be limited to 5.5% per annum, NU will have to achieve all of the projected synergies.

Those synergies which affect FPPAC are:

(000's \$)

	Seabrook O&M	Energy	Fossil Steam Unit Availability
Coal			
Year	Expense	Expense	Energy Impact
<u>Purchasing</u>	<u>Total</u>		
1990	0	6,113	0
1,061	7,174		
(1/2 yr)			
1991	22,233	5,418	280
2,053	29,984		
1992	21,870	7,948	749
2,229	32,796		
1993	20,889	3,702	800
2,330	27,721		
1994	23,486	4,025	1,300
2,723	31,270		
1995	24,777	3,448	1,810
2,723	32,758		
1996	<u>26,264</u>	<u>4,397</u>	<u>2,510</u>
<u>2,674</u>	<u>35,845</u>		
Total	139,519	35,051	7,447
15,529	197,548		

Ex. NU 16, NU response to Staff Record Request HD06-023 dated April 18, 1990.

NU's failure to achieve these synergies within the time frame projected would erode the likelihood that the rate projections would remain in the 5.5% range. Accordingly, the commission will hold PSNH strictly accountable in

subsequent rate proceedings to demonstrate that they have exercised their best efforts to achieve the projected levels of synergistic savings before any rate proposals are approved. NU and the State agreed that rates will be reduced below 5.5% in the event that the resultant costs through FPPAC or base rates are lower than those projected for the 5.5. Tr. April 19 at 21, May 1 at 83 and 89. The commission will accordingly scrutinize any proposed rate increase in this regard, whether it is more than or less than 5.5%.

Synergies for Stand-alone PSNH

As we found above, the extent to which Stand-alone PSNH can achieve the projected synergies was not quantified on the record. By definition, the synergies are attributable to NU's management of Seabrook and PSNH and, thus, would generally not accrue absent a merger of

the two companies. In the absence of a merger it is therefore likely that FPPAC charges will cause the annual rate increases to exceed 5.5%.

Nonetheless, there is some record evidence that Stand-alone PSNH could achieve a portion of the synergies even if the ultimate merger with NU is not achieved. It is possible that some savings would accrue to a Stand-alone PSNH as a result of lessons learned from NU's interim management. NU Trial Brief at 96. Some of the A&G, coal purchasing and fossil steam unit availability related savings may accrue with a Stand-alone company because of organizational changes made by NU under the Management Services Agreement. The Management Services Agreement will continue in effect until the consummation of the merger or the termination of the merger agreement and provides that NU will be

obligated to provide management services to PSNH for up to six months after the termination of the merger agreement to assist PSNH in the transition to new management. NU 1-E at 68. NU has also agreed to continue its management services to PSNH regarding the Seabrook Nuclear Power Plant for up to five years after the Management Services Agreement became effective. Id.

However, this evidence relating to the possibility that some synergies can be achieved in the absence of a merger cannot sustain a finding that synergies will justify an Investment Adder for Stand-alone PSNH. Accordingly, to the extent that we must find in this proceeding a value for the Investment Adder for a Stand-alone PSNH, we will find that it has no value. The plan provides, however, that this issue be revisited in the event that the PSNH

merger with NU does not occur subsequent to the First Effective Date. At that time this commission will determine what, if any, portion of the investment adder calculated herein will have continuing value after the Termination Date and which, if any, other amounts should be included in an Investment Adder for Stand-alone PSNH. Ex. NU 1-E at D-86.

E. OUR FINDING OF PUBLIC GOOD IS NOT
CONDITIONED UPON A MERGER WITH NU

We believe that a merger of PSNH with NU as contemplated by the joint reorganization plan and the Rate Agreement lends fundamental support to a finding of the public good. We have approved the acquisition of PSNH by NU based on performance of the merger agreement.

Despite the possibility of the achievement of some synergies by Stand-alone PSNH, it is fair to assume that the

savings would be substantially less on a stand-alone basis than with a merger resulting in an increase in rates above the 5.5% per year level. Even though the commission would be able to make an adjustment to the Investment Adder should the merger not occur, there remains a substantial concern that the rate plan may not be in the public good if this concern and favored a one-step-only reorganization with a resolution of the bankruptcy being coincidental with the merger, but was not successful in persuading the creditors and equity holders. NU Trial Brief at 97.

However, if we condition our acceptance of the agreement to serve the public good on the achievement of a merger, the PSNH reorganization cannot be financed at step one. Imposition of a condition that a merger is essential for a finding of public good would be a major

substantive change in the terms of the rate agreement suspending financing and implementation until the merger was in fact consummated. Such a condition could delay resolution of the bankruptcy and result in less favorable rates for New Hampshire ratepayers. We would accordingly consider imposing this condition only if there were a substantial possibility of being left with a Stand-alone PSNH.

Currently, PSNH and NU are committed to merge under the merger agreement as ruled by the Bankruptcy Court's confirmation order. We fully anticipate that the merger will in fact be consummated. However, we also recognize that the merger agreement by its terms may be terminated after the First Effective Date by mutual consent of PSNH and NUSCO or by unilateral action of either party for (1) failure to receive

- an unconditional regulatory approval or failure of other conditions to the merger, (2) the merger does not take place by December 31, 1991, or (3) acceptance by PSNH of an unsolicited offer by a "whit knight". Ex. NU 1-E at 66. The reason these termination provisions loom in importance is because there is a likely lag of almost two years between the issuance of this Commission's report (First Effective Date) and a final order of the FERC currently not anticipated until the latter part of 1991 or even into 1992. There may also be other regulatory approvals which may trigger the termination date unless such date is extended by mutual agreement of the parties. During this Interim Period, Stand-alone PSNH will be owned by the creditors and equity committees under the terms of the reorganization plan with a Board of Directors designated by these

committees subject to management services of NU and capacity arrangements continuing for five years of the rate period.

However, we are mindful of various reasons why the merger should in fact take place: 1) a mutual termination or breach by either PSNH or NUSCO is unlikely, 2) the emergence of a new suitor is similarly unlikely since the "auction" probably produced all serious bidders; 3) there is a \$25 million termination fee and PSNH would also face \$45 million reimbursement of NU's expenses as well as a probably protracted law suit by NU, 4) an unsolicited acquisition offer appears to be remote given that no bidder would currently be prepared to pay more than the \$2.3 billion incorporated in the Rate Agreement to entice PSNH creditors and equity holders; 5) the commission must

review any amendment to or deviation from the merger agreement (including any alternative acquisition), and based on the evidence presented at that time, could rule that the public good will not be served without a merger; and 6) it is unlikely that PSNH would act unreasonably in preventing the merger from occurring in that PSNH will continue to be regulated by this commission and any costs resulting from PSNH's actions leading to a failure to achieve synergistic savings will be subjected to strict prudence review.

In summary, we find that the benefits associated with facilitation of the financing proposals and termination of the bankruptcy outweigh the risk to the public associated with a Stand-alone PSNH. Further, since we find that the merger is likely to occur, and that we will have continuing review power in the

event that the Plan's benefits are threatened because of conditions placed by other regulatory agencies, we find that the Agreement's provision for termination of the merger agreement does not place the Agreement as a whole outside the realm of public good. Accordingly, our finding that the rate plan will serve the public good is not conditioned on a merger between PSNH and NU. If the agreement is changed by FERC or another regulatory agency so as to threaten the merger, or if subsequent changes result in the merger agreement being terminated, this commission may reassess whether the agreement continues to serve the public good.

F. FINANCING THE REORGANIZATION

Table I summarizes NU's financing request to raise the necessary capital to pay the creditors and equity holders of PSNH in accordance with the

reorganization plan. This payment will take place after the First Effective Date, i.e. the date of the commission's report and order. Subject to later merger of NUAC into Stand-alone PSNH, Reorganized PSNH operates during the interim period under a new board of directors and management with the continued benefit of the Rate Agreement, the Management Services Agreement and capacity arrangements. Merger of NUAC into PSNH results in PSNH becoming a wholly owned subsidiary of NU and Seabrook is transferred to NAEC.

TABLE I
FINANCING REQUEST FOR APPROVAL

Embedded Cost of Capital for Stand Alone PSNH
(Busch Supplementary Exhibit 27, Page 2)

	Rate (A)	Term (B)	Principal Amount (C)	Annual Interest Cost (D)	Issuance Cost (E)	Annual Issue Cost (F)	Total Annual Cost (G)	Net Proceeds (H)	Embedded Cost (I)
Taxable IDB	10.75%	30	200,020	21,500	8,760	692	22,192	191,940	11.60%
Tax Exempt IDB	9.50%	30	282,500	26,838	9,070	302	27,140	273,430	9.93%
7Yr 1st Mortgage	11.75%	7	167,500	19,681	5,350	764	20,446	162,150	12.61%
5Yr 1st Mortgage	11.75%	5	175,000	20,563	5,595	1,119	21,682	169,405	12.80%
Term Note	10.75%	5	320,000	34,400	2,900	530	34,980	317,100	11.03%
Total Long Term Debt			1,145,000	122,981	31,675	3,458	126,439	1,113,325	11.36%
Short Term Debt	9.75%		36,968	3,604			3,604	36,968	9.75%
Total Debt			1,181,960	126,585	31,675	3,458	130,042	1,150,285	11.31%
Preferred Equity	12.40%	10	125,000	15,500	5,285	529	16,029	119,715	13.39%
Total Debt and Pref			1,306,960	142,085	36,960	3,986	146,071	1,270,000	11.50%
Contingent Notes	15.85%	10	205,000	32,493	100	10	32,503	204,900	15.86%
Total Fixed Income			1,511,960	174,577	37,060	3,996	178,573	1,474,900	12.11%
Common Equity			640,000						
Total Capital			2,159,960						

NOTE: All amounts shown in column C through H are in thousands of dollars.

All data are reproduced from Busch Supplemental Exhibit 27, page 2.

The embedded cost for each capital item shown in column I of the table are calculated as the ratio of total annual cost (column G) and net proceeds (column H). total annual cost for each component of permanent capital is the sum of the annual interest expense in column D and the annual amortization of issuance costs (Annual Issue Cost, column F). Principle amount of net proceeds is principal amount outstanding in column C minus total issuance expense in column E.

Table II (Busch Ex. 2) reflects the current application of amounts between public debt issuances and an Interim Bank Loan Facility, if needed. Busch Supplemental Direct Testimony NU 5-B. The \$487 million term facility consists of \$350 million Interim Loan Facility and a \$200 million Revolving Credit Facility with a syndicate of banks. p.45 NU 5-A. Under the Term Facility the banks will loan \$487 million to PSNH on the effective date of the Plan to be used to satisfy a portion of the cash requirements of the Plan. To the extent banks make loans under the Interim Facility, an equal principal amount of first mortgage bonds will be issued to secure the Term Facility, Interim Facility and Revolving Credit Facility. PSNH will grant the banks a second mortgage and a Seabrook mortgage to be filed with the commission at a later date.

TABLE II

STEP 1 CAPITAL STRUCTURE AS CURRENTLY PROPOSED
(\$ Millions)

	Amount	Percent of Total	Estimated Interest Rate
Debt			
Taxable IDB	\$200.0	9%	9.75%
Tax - Exempt Bonds	282.5	12%	8.50%**
Contingent Notes	205.0	9%	15.85%
First Mortgage Bonds	342.5	15%	10.75%
Term Loan - Bank Debt	487.0	21%	9.75%
Total Debt	\$1,517	66%	10.57%
Preferred Stock	125	6%	11.40%
Common Stock	648	28%	
TOTAL CAPITALIZATION	\$2,290	100%	

* Includes Letter of Credit cost
** Without bond insurance

"...There will be three kinds of securities of PSNH to be issued to existing security holders of PSNH. These securities have not changed since my prior testimony and are as follows:

Approximately 32,350,000 shares of PSNH common stock to be issued to current unsecured creditors, preferred stockholders and common stockholders of PSNH. The exact number of shares will be determined subsequently in accordance with the terms of the Plan, and accordingly, we ask the Commission to authorize PSNH to issue shares of common stock as required by the Plan, including the shares to be issued as stock dividends under the Plan.

up to \$205,000,000 of Contingent Notes of PSNH to be issued to current preferred and common stockholders of PSNH.

contingent warrant certificates to be issued to current preferred and common stockholders of PSNH."

Busch Supplemental Direct Testimony NU 5-
B at 5-6.

The securities to be issued for cash are summarized as follows:

"up to \$400,000,000 aggregate principal amount of first mortgage bonds, to be issued in one or two series and sold to the public.

up to \$120,000 aggregate principal amount of a series of tax-exempt pollution control revenue bonds to be issued by the IDA in one or more series and sold to the public. These pollution control revenue bonds, like the others referred to below, will be secured by first mortgage bonds issued by PSNH.

up to \$232,500,000 aggregate principal amount of tax-exempt pollution control refunding revenue bonds to be issued by IDA in one or more series and sold to the public.

up to \$300,000,000 of aggregate principal amount of taxable pollution control revenue bonds to be issued by IDA in one or more series and sold to the public.

up to \$125,000,000 of preferred stock to be sold to the public.
p.10, Busch NU 5-B.

Each element of the financing is described in detail in Busch's original and supplemental testimony.

The commission is requested to

approve the issuance of common stock by PSNH at Step 1 to its current unsecured creditors and equity security holders and the issuance each quarter of common stock in payment of stock dividends on that stock. Ex. NU 5, at 26-30, Busch, Ex. NU 5-B at 13-14. At Step 2 of the PSNH Reorganization in order to consummate the merger and implement the Joint Plan, three additional common stock issues will be subject to the approval of the commission: the issuance of a new series of PSNH common stock to NU, the issuance by NAEC of all its common stock to NU, and the issuance by NAESC of its common stock to NU.

At step one, PSNH will also issue five million shares of cumulative preferred stock, \$25 par value with cumulative cash dividends at a rate to be negotiated by NUSCO by the time of the sale.

The commission has also been requested to remove the prohibition in order no. 17,222 (DF 84-167) against PSNH declaring or paying dividends on its stock. Unless the prohibition is removed there can be no distribution of stock dividends on common stock to be issued to unsecured creditors and equity security holders and cash dividends on the preferred stock to be issued.

At step two, contingent unsecured notes with a principal amount of \$205 million are proposed to be issued and distributed to PSNH's preferred and common stockholders. Busch Pre-Filed Direct Testimony, NU 5, p.50. The contingencies relate to the issuance of an unrestricted full power operating license to Seabrook (which has now been issued), and various power ascension percentages of the Seabrook unit's rated power, ranging from 5% (for Series A)

to 90% (for Series B), and releasing Seabrook to the New England Power Exchange for dispatch (which has now been accomplished). Series C terminates its contingency when the warranty run as defined in the Joint Plan has been completed.¹³ Draft forms of indenture for three series of contingent notes, and for a consolidated series of contingent notes were supplied in Busch Exhibits 4 and 5, NU 5-A.

Contingent warrant certificates will be issued at Step 2 to purchase approximately 8,431,000 NU common shares.

¹³The Joint Plan Defines warrant run as follows: "Warranty Run" means a period of 100 continuous hours during which the Seabrook Unit No. 1 nuclear steam supply system and turbine successfully operate, in accordance with the warranty provisions of the respective contracts under which the nuclear steam supply system and the turbine were constructed, at least at the capability rating determined for the Unit by the New England Power Pool for the first year of operation. NU 1-E at A-9.

At Step 1, PSNH will issue to its former preferred and common shareholders contingent warrant certificates evidencing the right to receive NU warrants when Step 2 occurs, at which time the holders of these certificates will surrender them and receive the NU warrants in exchange. Busch NU 5-B. p. 16, See Busch Exhibit 6 for draft of agreement for certificates to be issued by PSNH, and Ex. 7 for the form of warrant agreement to be entered into by NU, at Step 2.

Costs of Financing

The estimated costs of financing debt, preferred, equity and contingent notes are summarized in Table III.

The initial embedded cost of debt (excluding contingent notes) is estimated at 10.25%, the initial embedded cost of debt (excluding contingent notes) plus the preferred stock is estimated at

10.43%; and the overall initial embedded cost of debt (including the contingent notes) plus the preferred stock is estimated at 11.12%. The projected financing costs are below the 11.5% overall embedded cost ceiling excluding contingent notes shown on Table 1. The cost of financing rates in Table I, were raised by 100 basis points (except for the contingent notes) to allow flexibility in financing up to that amount. Busch, NU 5-B pp.51-52.

On March 29, 1990 the commission staff was notified that Standard and Poor's had stated that it expects to assign initial ratings of BBB- to the first mortgage bonds, BB+ to the preferred stock and BB to the contingent notes. Those ratings are higher than was expected by company officials (Busch testimony p. 38, company responses to Q-Staff-158,159) at the time that they

filed their testimony and may imply lower
than expected financing costs.

TABLE III

REVISED FINANCING PROPOSAL

Embedded Cost of Capital for Stand Alone PSNH
(Busch Supplementary Exhibit 2, Exhibit 10)

	Rate	Term	Principal Amount	Annual Interest	Issuance Cost	Annual Issue Cost	Total Annual Cost	Net Proceeds	Embedded Cost
	(A)	(B)	(C)	(D)	(E)	(F)	(G)	(H)	(I)
Taxable IDB	9.75%	30	200,000	19,500	8,760	692	20,192	191,240	10.56%
Tax Exempt IDB	8.50%	30	282,500	24,813	9,070	302	24,315	273,430	8.85%
First Mortgage Debt	10.75%	5-7	342,900	36,819	10,945	1,824	38,643	331,555	11.66%
Term Note	9.75%	5	487,000	47,483	2,900	580	48,063	484,100	9.93%
Total Debt			1,312,000	127,814	31,675	3,399	131,212	1,280,325	10.25%
Preferred Equity	11.40%	10	125,000	14,250	5,285	529	14,779	119,715	12.34%
Total Debt and Pref			1,437,000	142,064	36,960	3,927	145,991	1,400,040	10.43%
Contingent Notes	15.85%	10	205,000	32,493	100	10	32,503	204,900	15.86%
Total Fixed Income			1,642,000	174,566	37,060	3,937	178,493	1,684,940	11.12%
Common Equity			640,000						
Total Capital			2,290,000						

NOTE: All amounts shown in column C through H are in thousands of dollars.

All data are reproduced from Busch Supplemental Exhibit 10.

The embedded cost for each capital item shown in column I of the table are calculated as the ratio of total annual cost (column G) and net proceeds (column H). Total annual cost for each component of permanent capital is the sum of the annual interest expense in column D and the annual amortization of issuance costs (Annual Issue Cost, column F). Principle amount of net proceeds is principal amount outstanding in column C minus total issuance expense in column E.

The Proposed Financing Serves the Public Good

The New Hampshire Supreme Court defined the law governing the scope of the commission's responsibility when considering a utility's financing request in the following terms:

"The scope of the commission's responsibility rests upon the mandate of RSA 369:1 and :4, which require the commission's approval for the issuance of a utility's securities and which condition the granting of that approval on a finding that the amount and objects of the proposed financing will be in the 'public good,' Id., as being 'reasonable taking all interests into consideration," Grafton Etc. Co. v. State, 77 N.H. 539, 542, 94 A. 193, 195 (1915). Thus, in Appeal of Easton, 125 N.H. 205, 480 A. 2d 88, we followed longstanding law in holding that a financing in the public good must be one 'reasonably to be permitted under all the circumstance of the case,' Id. at 212, 480 A.2d at 91 (quoting Grafton, supra at 540, 94 A. at 194). Accordingly, we emphasized that the express statutory concern for the public good comprises more than the terms and conditions of the financing itself, and we held that the

commission was obligated to determine whether the object of the financing was reasonably required for use in discharging a utility company's obligation, which is to provide safe and reliable service, Id. at 211, 480 A. 2d at 90. Moreover, we specifically decided that the commission was obliged to determine whether the company's plans to accomplish that object were economically justified when measured against any adequate alternatives; and whether the capitalization resulting from the utility company's plans would be supportable. Id. at 212-13, 480 A. 2d at 91."

Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606, 614 (1986).

We have examined the terms and conditions of the financing and find that the issuance of the securities required to finance the Joint Plan should be authorized as serving the public good. The Step 2 financings are essential to consummate the merger and implement the Joint Plan. Since the merger of PSNH and NU is an integral facet of the

Reorganization Plan and serves the public good, it is important to authorize at this time the necessary stock issuances to effect the merger. These approvals are subject to disclosure of specific pricing terms for approval before issuance.

We have also determined that the object of the financing may be summarized as follows:

- o to consummate the Compromise Joint plan confirmed by the Bankruptcy Court,
- o to terminate the bankruptcy proceeding,
- o to enable the acquisition of PSNH by NU,
- o to serve the economy of the State.

Thus, consistent with the N.H. Supreme Court's precept we have determined that the object of the financing was reasonably required for use in discharging NU's and Reorganized

PSNH's obligation to provide safe and reliable service.

We have also determined that NU's plans to consummate the Joint Reorganization Plan confirmed by the Bankruptcy Court and implementation of the Joint Plan by the Rate Agreement between the State and NU are economically justified when measured against any "adequate alternatives." No adequate alternative to the NU financing plan and acquisition have been presented either to the Bankruptcy Court or this commission. Nevertheless, based on record evidence we have examined and evaluated the rate structure under traditional ratemaking for Stand-alone PSNH and under alternative rate plans supra. We have concluded that the rates produced by the Rate Plan represent a fair and equitable compromise within the ambit of results reasonably to be

anticipated in a litigated rate case by Stand-alone PSNH. Our evaluation of record evidence relating to the Rate Plan compels the conclusion that the Joint Reorganization Plan and Rate Agreement will serve the public good.

We now address the question of whether the capitalization resulting from NU's plans would be supportable. As demonstrated by our analysis of the rate support for the resulting capital structure of Reorganized PSNH, with and without Seabrook operating, Stand-alone PSNH with and without Seabrook operating, and NAEC with and without Seabrook operating, the resulting capitalization is supportable by reasonable rates.

Financial Viability

The capital structure resulting from implementation of the Reorganization Plan is supportable by reasonable rates.

The financial projections over the seven year fixed period support the conclusion that the Joint Plan may be financed and that projected revenues generated by reasonable rates will be adequate to support the capital structure and NU's and affiliate corporations' operations to provide safe, reliable and reasonably priced electric service.

Financial Viability

The capital structure resulting from implementation of the Reorganization Plan is supportable by reasonable rates.

The financial projections over the seven year fixed period support the conclusion that the Joint Plan may be financed and that projected revenues generated by reasonable rates will be adequate to support the capital structure and NU's and affiliate corporations' operations to provide safe, reliable and reasonably priced electric service.

The key assumptions underlying the financial projections contained in Busch original Attachment 2 and Busch Supplementary Exhibit 27 are as follows.

(1) New PSNH-Seabrook operates: NU's acquisition is consummated on July 1, 1990 and Seabrook attains commercial operation prior to July 1, 1990 (Busch original Att.2, p.2)

(2) New PSNH-Seabrook Canceled: NU's acquisition is consummated on July 1, 1990 and Seabrook does not attain commercial operation and is ultimately canceled on December 31, 1991. (Busch original Att. 2, p.2)

(3) Stand Alone PSNH - Seabrook operates: Merger Terminates in 1991 and Seabrook attains commercial operation prior to July 1, 1990.

(4) Stand Alone PSNH-Seabrook canceled: Merger agreement terminates in 1991 and Seabrook does not attain commercial operation and is canceled on December 31, 1991.

(5) Upon termination of the merger by stand alone PSNH, NU is reimbursed for expenses estimated to be \$12 million in 1991 and an additional \$20 million of NU expenses will be capitalized by

Stand Alone PSNH. In addition PSNH is obligated to pay the \$25 million termination fee (Busch Att. 2, p.2)

(6) In both of the New PSNH scenarios, the company will be capitalized at \$1.596 Billion. (Busch original Attachment 2, p.3). The initial capital structure will consist of \$1,151,000 of debt (72 percent of capital), \$125 million of preferred equity (8 percent of capital) and \$320 million of common equity (20 percent of capital) contributed by NU (Busch Att. 2, pp. 2, 8 for Seabrook Operates, p. 11 for Seabrook Canceled)

(7) In the New PSNH scenarios the capital structure of the New PSNH will improve to 48 percent long term debt by 1996 from 72 percent if Seabrook operates (Busch Att. 2, p. 3,8) and to 50 percent long term debt by 1996 from 72% if Seabrook is canceled (Busch Att. 2, p. 11)

(8) North Atlantic will be capitalized with \$140 million of equity contributed by NU, \$355 million from a first mortgage bond on the Seabrook assets and \$205 million of Seabrook contingent notes. (Busch Att. 2, p.3) in 1996 if Seabrook runs but begins with ratios of 21% common equity and 79% debt (Busch Att. 2, p.28). If Seabrook is canceled the ratios for North Atlantic

will not change over the period of the fixed rate plan. (Busch Att. 2, p. 28)

(9) Stand-alone Seabrook is capitalized with \$1.517 billion of debt, \$125 million of preferred stock and \$648 million of common equity. (Busch Att. 2, p.4, 14, 17).

(10) If Seabrook operates the debt ratios will fall from 66% in 1990 to 50% in 1996 while the preferred ratio rises from 6% to 7% over the period. The common equity ratio rises from 28% to 43% (see table IV, Column D, Section 3) according to the original Stand-alone PSNH-Seabrook Operates scenario contained in original Attachment 2, p. 8)

(11) If Seabrook is canceled, Stand-alone PSNH will initially have a debt ratio of 66% which falls to 48% over the course of the rate plan. The ratio of preferred equity to total capital rises from 6% to 7% and the proportion of common equity rises from 28% to 45%. (See table IV, Column E, Section 3)

(12) Peak load is expected to grow at a 2.3 percent annual rate over the course of the fixed rate period (Busch, Att. 2, p.6)

(13) Seabrook capacity factors are expected to range from 60% to 70% over the six year period

according to the following
schedule (Busch Att. 2, p.6).

Seabrook Capacity Factors

1990	60%
1991	63%
1992	67%
1993	67%
1994	67%
1995	67%
1996	70%

(14) Operation and maintenance expenses are expected to escalate at 5.3 percent compounded annually over the fixed rate period. (Busch Att. 2, p.6)

Revised Assumptions

(15) All assumptions previously outlined underlie the revised financial projections of the Stand-alone PSNH-Seabrook Operates scenario, shown in Busch Supplemental, Exhibit 27 and summarized in column F of Table IV. The difference between the original Stand-alone-Seabrook Operates case (table IV, Column D) and the revised projections (table IV, Column F) concern the financing mix and expected capital costs.

TABLE IV
PSNH FINANCIAL SUMMARY

INDUSTRY AVERAGES----- (A) (B) (C) (D) (E) (F)

(All data from Busch Attachment 2) ORIGINAL BUSCH TESTIMONY
(Busch Exhibit 27)
-----STAND ALONE PSNH----- SUPPLEMENTAL--
-----STAND ALONE PSNH-----

	Seabrook Operates		Seabrook Canceled		Seabrook Operates Seabrook Canceled		Seabrook Operates	
	1990	1996	1990	1996	1990	1996	1990	1996
1) Earned Ret. on Common Equity								
	ROE Net Income (Cumulative NPV)							
	0.53%	11.75%	-2.69%	13.25%	1.88%	6.64%	0.97%	6.10%
1989	12.3%	ROE Net Income (Average)					-2.89%	10.09%
1988	13.3%	21.00%	-2.69%	13.25%	1.88%	15.42%	0.97%	15.63%
1989	13.4%						-2.28%	20.64%
Industry Average ROE of 12.3% is achieved by PSNH in year:								
	1994		1994		1996		1995	
							1994	

2) TIER (w/o AFUDC)	2.47	1.98	5.22	2.01	4.5	1.49	3.76	1.58	4.33	1.42	3.76
3) Capital Structure											
LT Debt	47.6	72	48	72	50	66	50	66	48	72	53
Pref Equity	8.0	8	10	8	9	6	7	6	7	8	8
Com. Equity	39.5	20	42	20	41	28	43	28	45	20	40

FOOTNOTES:

1) RETURN ON COMMON EQUITY:

Industry Average- Utility Focus, March 20, 1990.

PSNH (Columns B, C, D and E) - ROE Net Income (cumulative NPV) and ROE Net Income (average) for each PSNH scenario in columns B, C, D, and E are from Busch's original testimony, attachment 2. Page references are shown for each scenario in lines 6 and 7 below.

PSNH (column F) - ROE Net Income (cumulative NPV) and ROE Net Income (average) in column F are from Busch's supplementary testimony, exhibit 27. Page references are shown in lines 6 and 7 below.

W
W
W
W

2) TIMES INTEREST EARNED RATIO:

Industry Average - Moody's Public Utility Manual, March, 1990. 1988 data are shown.

PSNH (Columns B, C, D and E) - Busch's original testimony, attachment 2. Page references are shown in line 8 below.

PSNH (Column F) - Busch's supplementary testimony, exhibit 27. Page references are shown in line 8 below.

3) CAPITAL STRUCTURE RATIOS:

Industry average- Moody's Public Utility Manual, March, 1990. 1988 data are shown. Weights do not sum to 1 due to omission of short term debt.

PSNH (Columns B, C, D and E) - Busch's original testimony, attachment 2. Page references are shown in line 9 below.

PSNH (Column F) - Busch's supplemental testimony, exhibit 27, Page references are shown in line 9 below.

-----BUSCH ORIGINAL TESTIMONY-----				-----SUPPLEMENTAL-----
-----NEW PSNH-----		-----STAND ALONE PSNH-----		-----STAND ALONE PSNH-----
(B)	(C)	(D)	(E)	(F)
Seabrook Operates	Seabrook Canceled	Seabrook Operates	Seabrook Canceled	Seabrook Operates
6) ROE Net Income (Cum NPV) page 25, line 4	page 25, line 11	page 26, line 4	page 26, line 11	page 6, line 5
7) ROE Net Income (average) page 25, line 3	page 25, line 10	page 26, line 3	page 25, line 10	page 6, line 3
8) Times Interest Earned page 25	page 25	page 26	page 26	page 6
9) Capital Structure Ratios calculated from data on: page 8	page 11	page 14	page 17	page 4

Financial Viability of New PSNH and
Stand-Alone PSNH

New PSNH-Seabrook Operates
(Table IV, Column B)

As shown in Section 1 in Table IV on a year by year basis the ROE net income average rises from .53 percent in 1990 to 21 percent in 1996. PSNH in this scenario begins to earn the industry average ROE in 1994. As a result of the rising ROE net income (average) the profitability of the company on a cumulative investment basis as measured by the ROE net income (cumulative investment basis as measured by the ROE net income (cumulative NPV) rises throughout the fixed rate period. Although the 11.75 percent earned on equity on a cumulative NPV basis falls short of the current industry average, it can be concluded that an investor in PSNH common equity nearly achieves the current industry level of profitability over the

fixed rate period.

The TIER coverage figures in Section 2, Column B of Table IV show that the company's ability to meet obligatory interest payments on long term debt begins the period at a level slightly less than the current average in the industry (1.98 vs. 2.47) but grows to nearly twice that of the industry (5.22 vs. 2.47) over the fixed rate period.

Section 3, Column B of Table IV shows that while the company begins the fixed rate period as a highly leveraged enterprise, with 72% debt, its cash flow should be sufficient to allow it to attain a debt level of 48% and capital structure consistent with the average company in the industry by 1996. (see the capital structure ratios for the industry average and those in column B of Table IV, section 3.) See New PSNH Analysis of Significant Financial Ratio Merger Case

with 1% Higher Rates than Anticipated.

Ex. 27 at p.6

New PSNH-Seabrook Canceled
(Table IV, column C)

The cancellation of Seabrook requires replacement power costs and adversely affects the profitability of PSNH, particularly during the early years of the rate plan. The ROE net income (average) measure of profitability begins the period at 2.69 percent but quickly recovers so that by 1996, PSNH is earning 13.25 percent on common equity. Section 1, Column C Table IV. PSNH exceeds the industry average level of profitability in 1994.

The pattern of change in the ROE net income (cumulative NPV) also suggests that cancellation of Seabrook had adverse consequences during the early years of the plan. Over the course of the six year plan, however, the profitability of PSNH

improves on a cumulative net present value basis from (2.69%) in the first year as indicated by the 13.25% ROE net income cumulative NPV achieved over the course of the plan.

The TIER coverage figure in Section 2 of Table IV, Column C suggests that the cancellation of Seabrook does not significantly affect the ability of PSNH to meet interest payments when due. Earnings coverage at 2.01 times long term interest in 1990 is at about the same level whether Seabrook operates or not. As the end of the rate plan approaches, however, the coverage ratio is seen to be measurably lower if Seabrook is canceled (4.5 if Seabrook is canceled vs. 5.22 if Seabrook operates). The end of period level of interest coverage is adequate in relation to the current industry average even if Seabrook is canceled.

Section 3 of Table iv, column C

shows that a capital structure very near that of the current industry average (1_T debt 50%, Pref. Equity 9%, Com. Equity 39.5%) is attained by PSNH in 1996 in the event that Seabrook is canceled.

Stand-alone PSNH- Seabrook Operates
(the original and revised projections for this scenario are shown in Table IV, columns D and F respectively)

On a stand alone basis, the profitability of PSNH falls short of that attained in the previous two scenarios but should rise to the current industry average level by the end of the rate plan. According to the original projections (column D of Table IV) the return on equity begins at 1.88 percent and rises to 15.42 percent in 1996, the year in which the current industry average return on equity is achieved. On a cumulative investment basis, the profitability of the equity investment of the company rises only to 6.64% (earned

return on equity) over the course of the seven year rate plan (Column D Section 1 of Table IV).

As shown in Section 2 of Table IV, the TIER measure of long term interest coverage begins at a level of 1.49 and rises to 3.76 by the end of 1996. Although low by industry standards during the early years of the plan, the coverage level should exceed the industry average TIER of 2.47 by 1996.

The capital structure ratios shown in Section 3 of Table IV, column D indicate that although PSNH begins the period with much more financial leverage than current industry standards (66% debt vs. 47.6% debt) it nearly attains the current industry average degree of leverage by 1996 (50% L-T debt vs. 47.6% industry average).

The revised projections can be examined by reviewing column F of Table

IV. Differences between the figures in column F of Table IV. Differences between the figures in column F and column D reflect the assumptions about capital costs and a different financing mix. The effect of those assumptions is to lower the profitability of PSNH in the early years of the plan. Profitability (ROE net income average) rises on an annual basis to reach the current industry average level in 1994 and exceeds 20% by 1996. On a cumulative net present value basis the equity investment in PSNH is more profitable than was the case under the original projections (10.09% vs. 6.64% ROE net income cumulative NPV).

Interest coverage levels under the revised projections of the Stand-alone PSNH-Seabrook Operates scenario are virtually identical to those under the original projections. The TIER under the revised projections begin the period

1.42, significantly less than the industry average of 2.47 but end the period higher at 3.76. Column F, Section 2, Table IV.

The capital structure under the revised projections begins the period with 72 percent of permanent capital supplied by long term debt, 8% by preferred equity and 20% from common equity. Column F, Section 3, Table IV. By the end of the period, PSNH remains relatively highly leveraged with a debt to total capital level of 53%, preferred equity 8%, common equity 40%, compared to an industry average of L_T debt 47.6%, preferred equity 8%, and common equity 39.5%.

Stand-alone PSNH-Seabrook Canceled
(Table IV, column E)

The cancellation of Seabrook has an adverse impact on the profitability of PSNH, particularly during the early years

of the rate plan. On an annual basis the return on equity, which begins the period at .97%, reaches 15.63% by the end of the fixed rate period. On a cumulative net present value basis the profitability of NU's equity investment in PSNH rises to only 6.10% by the end of the fixed rate period. The ROE net income (cumulative NPV) will continue to rise after the end of the fixed rate period even though its return on equity in 1996 of 15.63% will likely be reduced as conventional rate setting procedures are implemented.

The interest coverage ratio begins the fixed rate period under the Stand alone-Seabrook Canceled scenario as a highly leveraged company with debt constituting 66% of permanent capital. By the end of the fixed rate period, however, the current industry average proportion of debt is reached.

Summary

In all scenarios both actual and cumulative returns on equity for PSNH begin at low levels and rise over the course of the plan to more acceptable levels. The cumulative ROE's rise to the 1989 industry average level in the 1994-1996 period depending on the particular scenario in question. The ROE level is less important during the early years of the rate plan and increases in importance during the later years as generally it measures the ability to attract capital. Since NU has already committed to a specified level of equity financing and no external equity will be raised during the course of the plan, the ROE is important as PSNH reemerges with traditional ratemaking at the end of the plan.

Of more importance than the ability to attract capital during the early years

of the plan as measured by the earned ROE is the ability of the company to service its fixed income obligations held by outside creditors. That ability is measured by the coverage ratio. TIERS appear marginally adequate although not outstanding during the early years of the plan for all scenarios.

Given the commitment by NU to provide the initial capital, PSNH can evolve into a viable company on a par with the average electric utility. Specifically, PSNH under all of the scenarios has an interest coverage ratio that, although lower initially, rises above the current industry average during the course of the rate plan and substantially exceeds it by the end of the fixed rate plan.

Similarly, while PSNH emerges from bankruptcy under all of the scenarios as a highly leveraged company, by the end

of the fixed rate period the company has regained an industry average capital structure. There is no assurance however that the industry average figures currently existing will remain unchanged over the seven year period.

Under the plan PSNH attains a financially attractive financial profile earlier in the merger scenarios than it does as a stand-alone utility whether Seabrook operates or not.

Company responses to several data requests propounded by staff and the Office of Consumer Advocate (OCA) suggest that the financial viability of PSNH either as a subsidiary of NU or as a stand alone company is relatively sound under varying conditions whether or not Seabrook operates. For example, Q-OCA-014 response claims that the ROE floor would not be triggered by lower growth forecasts. Response to Q-OCA-015 claims

that reductions in the Seabrook capacity factor-would not affect the ROE. Response to Q-Staff-087 shows that the ROE floor would not trigger rate increases beyond the agreed upon 5.5% annually if PSNH just breaks even during the period 1990 through 1992.

Q-Staff-088 response shows the use of the "official" PSNH elasticities of demand rather than NU's elasticities of half that size would not trigger the ROE floor. Response to Q-Staff-154 shows that the effects of a recession similar to that experienced during 1980-82, does not result in reduced profitability that trigger the floor. The response to Q-Staff-155 indicates that capital cost rates would have to rise by about 500 basis points before the floor was triggered.

It is difficult to speculate on the implications of lower cumulative ROE's on

the financial viability of PSNH. It can be inferred only that the financial ratios associated with the low growth and with C&LM adversely affect the financial viability of PSNH and therefore the financial ratio used to measure it.

Financial Viability of
North Atlantic Energy Corporation

The analysis presented supra address the financial viability of PSNH under the one step (the new PSNH scenarios shown in columns B and C of Table IV) and at step one of two step plan (the stand alone PSNH scenarios shown in columns D, E and F of table IV). It remains to evaluate the financial viability of NAEC, since it emerges from step two of the two step plan as a New Hampshire utility.

Tables V and VI below characterize the financial viability of NAEC depending on whether Seabrook Operates (table V) or is canceled after the merger but before

December 31, 1991 (table VI). Due to the unique character of NAEC as a single asset generation-only company with a purchase power agreement with PSNH, a different set of financial statistics are needed to adequately describe its operation and financial condition than was used in Table IV.

For the Seabrook Operates possibility regarding Seabrook, the capital structure, net income, returns on common equity and on assets and two cash flow ratios are presented for NAEC for each year during the 1990-96 period. The cash flow coverage ratio measures the ability of the company to pay its significant amount of debt interest from operating cash flow. Similarly the ratio of cash flow to construction measures the ability of NAEC to be self sustaining in terms of its ability to earn the cash needed to maintain the necessary asset

base.

North Atlantic - Seabrook Operates

Upon completion of the merger and the sale of Seabrook to NAEC by PSNH, NAEC emerges with a capitalization of \$712 million, 80 percent of which is comprised of debt. The debt level shown in column A consists of the Seabrook bond and the contingent note. At the end of the rate plan NAEC will have a debt ratio of 67 percent.

NAEC should generate an increasing income stream which rises \$9.5 million in 1990 to \$30.7 million in 1996. Since the level of equity in NAEC rises at the same rate as its net income, the ratio of the two--return on common equity (column E)--remains relatively constant at a healthy 12.3-13.52% over the life of the rate plan. Return on assets (column F) however escalates from a low 1.35% in 1990 to over 4.0% during the late years of the

rate plan. Although low by investment standards, the return on assets is less meaningful for NAEC than is the return on common equity and the cash flow coverage ratio since the former measures the profitability to NU of its equity investment in the generating company while the latter measures the safety of interest payments and principal repayments to outside creditors.

As shown in column G of Table V NAEC does not become financially self supporting until 1992 when its cash flow stream first attains the magnitude to support the interest on the company's fixed income obligations. By the end of the fixed rate period, NAEC is generating \$1.49 of cash flow from operations per dollar of interest payments. As a result the company is viable.

NU's latest financial forecast projects cash flow coverage to be

substantially the same reflecting slight variations in financial costs. See Financial Assumptions, Supplemental Direct Testimony of Robert Busch, and p.1 NU ex. 27.

In conclusion, NAEC as initially capitalized and under the assumptions defining the merger in step two of the two step plan of reorganization is financially viable.

TABLE V
CAPITALIZATION AND KEY FINANCIAL RATIOS
North Atlantic - Seabrook Operates

Year	Debt (A)	Equity (B)	Assets (C)	Net Income (D)	Return on Common (E)	Return on Assets (F)	Cash Flow Coverage (G)	Cash Flow to Construction (H)
1990	562,100	149,585	711,685	9,585	6.41%	1.35%	0.89	1.97
1991	542,100	170,582	712,682	20,997	12.31%	2.95%	0.97	2.62
1992	522,100	194,648	716,748	24,066	12.36%	3.36%	1.07	2.96
1993	512,100	283,860	715,960	27,373	13.43%	3.82%	1.21	1.91
1994	512,100	212,856	724,956	28,774	13.52%	3.97%	1.39	2.79
1995	492,100	221,309	713,409	29,787	13.46%	4.18%	1.46	2.88
1996	477,401	233,054	710,455	30,666	13.16%	4.32%	1.49	3.11

Sources by column:

- A Amounts shown in columns A through C are from Busch original testimony, attachment 2, pages 20 and 28. The levels of debt (column A) represent the sum of long term debt and the Seabrook certificate (contingent note).
- D Figures in column D are from Busch's original testimony attachment 2, page 19.
- E Figures in columns E and F are the results of dividing net income (column D) by equity (column B) and by assets (column C) respectively.
- G Cash flow interest coverage (column G) is calculated as earnings before depreciation, amortization, interest and taxes minus capitalized expenses all divided by total interest expenses. See Busch original testimony, attachment 2, page 27.
- H Figures for the ratio of cash flow to construction expenditures (column H) are reproduced from Busch's original testimony, attachment 2, page 29.

NOTE: Upon completion of step two of the two step plan of reorganization PSNH's Seabrook interest is transferred to North Atlantic Energy Corporation (North Atlantic of NAEC) which is a newly created wholly owned subsidiary of NU. North Atlantic is initially capitalized as shown in the first line of the table.

Amounts shown in columns A through D are thousands of dollars.

North Atlantic-Seabrook Canceled

NAEC is projected to be capitalized initially at \$772 million (Table VI Column C), 80 percent of which is debt (Table VI Column A) and consists of the Seabrook bond and the contingent note. NAEC debt and equity ratios remain at 80 percent debt and 20 percent equity throughout the duration of the fixed rate plan.

The Seabrook power contract imposes an unconditional obligation on PSNH to purchase the full entitlement of its Seabrook power from NAEC whether or not Seabrook runs. In the event that Seabrook is canceled after the merger the return on equity stabilized at 14.16 percent during the later years of the plan (Table VI, Column E). Total asset returns (Table VI, Column F) remain at the 2.80 percent level throughout the seven year rate plan. Cash flow for NAEC is sufficient to

cover all costs of operation including
interest on long term debt.

TABLE VI

CAPITALIZATION AND KEY FINANCIAL RATIOS

North Atlantic - Seabrook Canceled 12/31/91

Year	Debt (A)	Equity (B)	Assets (C)	Net Income (D)	Return on Common (E)	Return on Assets (F)
1990	615,921	156,625	772,546	9,625	6.15%	1.25%
1991	289,958	68,503	358,461	21,536	31.44%	6.01%
1992	280,179	68,536	348,715	9,412	13.73%	2.70%
1993	272,240	65,729	338,969	9,422	14.12%	2.78%
1994	264,301	64,922	329,223	9,170	14.12%	2.79%
1995	256,363	63,114	319,477	8,935	14.16%	2.80%
1996	248,424	61,307	309,731	8,684	14.16%	2.80%

Sources by column:

- A Amounts shown in columns A through C are from Busch original testimony, attachment 2, pages 23 and 29. The
- B levels of debt (column A) represent the sum of long term debt and the Seabrook certificate (contingent
- C note).
- D Figures in column D are from Busch's original testimony attachment 2, page 22.
- E Figures in columns E and F are the results of dividing net income (column D) by equity (column B) and by
- F assets (column C) respectively.

NOTE: Upon completion of step two of the two step plan of reorganization PSNH's Seabrook interest is transferred to North Atlantic energy Corporation (North Atlantic of NAEC) which is a newly created wholly owned subsidiary of NU. North Atlantic is initially capitalized as shown in the first line of the table. As prescribed by the purchase power agreement, PSNH continues to purchase its full entitlement of Seabrook power even if the plant ceases to operate. As a result North Atlantic's earnings and cash flow remain at levels sufficient to discharge its operating expenses and debt interest costs.

Amounts shown in columns A through D are thousands of dollars.

Financial Evaluation - John F. Curley

Mr. Curley presented comprehensive testimony evaluating significant financial ratios of the subsidiaries resulting from the merger in the Rate Plan where NU acquires PSNH and Seabrook operates by July 1, 1990 and North Atlantic acquires Seabrook.

First, Mr. Curley examined the dramatic and rapid improvement in common equity ratios as follows:

	<u>New PSNH</u>	<u>North Atlantic</u>
12/31/91	22.5%	23.9%
12/31/92	26.1	27.2
12/31/93	28.4	28.5
12/31/94	31.7	29.8
12/31/95	35.6	32.4

p.8, NU 6.

The Rate Agreement and the capacity commitments of NU are central to the improvement in New PSNH equity ratios, increasing to 36% by December 1995 representing financial stability comparable to the current mean for low

investment grade utilities.

NAEC's lower common equity ratio is acceptable because NAEC's credit is supported by the Seabrook power contract. NU 6 at 10.

Second, Mr. Curley examined interest coverage as an important financial ratio to evaluate the company's ability to support debt obligations of the capital structure of New PSNH and NAEC. His interest coverage analysis concentrated on cash flow, taking into consideration the large non-cash amortization of the acquisition premium in the Rate Agreement.

He defined cash flow coverage as the quotient of the pre-tax earnings plus interest and amortization of acquisition premium divided by total interest expenses resulting in the following coverage:

	<u>New PSNH</u>	<u>Nor. Atl.*</u>
6 mos.end.12/31/90	2.0x	0.9x
Year ended 1991	2.2	0.9
Year ended 1992	2.6	1.0
Year ended 1993	3.0	1.1

*For NAEC, the numerator for the interest coverage calculations includes cash contributions from NU in consideration for NAEC's tax benefits.

Although NAEC's coverages are low relative to traditional coverages for electric utilities, investors would consider the attractiveness of the investment based on NAEC's contracts (e.g., Seabrook capacity, sharing) with new PSNH, the revenues from the Rate Agreement, the Management Services Agreement and operational support from NU. NU 6 at 12.

The third important ratio evaluated by Mr. Curley is cash flow from operations to total debt. The ratio measures the ability to reduce debt and

improve long term capitalization. Following are New PSNH and NAEC's net cash flow to total debt ratios:

	<u>New PSNH</u>	<u>NAEC</u>
6 mos.end.12/31/90	1.4%	2.5%
Year ended 1991	14.3	5.8
Year ended 1992	18.5	8.8
Year ended 1993	18.5	5.0

Mr. Curley concluded that both New PSNH and NAEC are financially viable. We find that projected revenues under the Rate Plan are adequate to service the resulting capitalization of PSNH and NAEC and that these utilities will have the ability to attract capital on a timely and reasonable basis. See Curley, NU 6 at 14.

Mr. Curley also analyzed all required PSNH external financings, e.g., New PSNH's bank debt, and concluded that these financings are attainable at the projected cost reflected in the capitalization of the company.

NAEC's first mortgage bonds - a senior security of NAEC - are marketable in the high yield and bond market. These securities will be viewed as a single asset nuclear project financing secured by contracts backed by the Rate Agreement, which the N.H. Legislation has ratified, subject to this commission's implementation.

NU's financing, including the timing and interest and preferred stock dividend rates used in Mr. Busch's forecasts are reasonable. NU 6 at 19.

We conclude that post-merger New PSNH and NAEC will be financially viable utilities with the resources to meet financial requirements and attaining over the seven year period of the Rate Agreement financial stability to support the capital structure. We also conclude that the Rate Agreement is essential to secure acceptance of the planned

financings in capital markets.

Financial Viability of Stand-alone PSNH

The Rate Agreement, which provides a relatively predictable revenue and earnings stream, the contractual commitments for generating capacity for five years and NU's management resources provided under the Management Services Agreement, substantially contributes to the stability and viability of Stand-alone PSNH. Analysis of Stand-alone PSNH's equity ratios, interest coverage ratios and cash flow to debt ratio indicates that Stand-alone PSNH is at least marginally able to support its capitalization and will survive as a viable entity capable of meeting its financial commitments.

Stand-alone PSNH Capitalization and Ratios

Initially, Stand-alone PSNH will

have a common equity ratio of 28%. NU 6 at 20. Within 3 1/2 years, common equity is estimated to increase to the Low Investment Grade Utilities mean of 34% of capitalization and by December 1995 to 40%

The projected interest coverage for Stand-alone PSNH is as follows:

6 months ended	12/31/90	1.5x
Year ended	1991	1.7
Year ended	1992	1.9
Year ended	1993	2.2

This coverage takes into account the significant non-cash expense amortization of the acquisition premium prescribed by the rate agreement. NU 6 at 21.

Stand-alone PSNH with Seabrook canceled - as we have discussed supra - has an interest coverage ratio at the beginning of the fixed rate period at 1.50 times - (significantly less than the industry average at 2.47 times) although coverage improves to 4.33 times at the

end of the period.

Based on Mr. Busch's financial projections in his prefiled direct testimony, cash flow to debt ratios are adequate to meet financial commitments, as shown below:

6 months ended	12/31/90	1.1%
Year ended	1991	11.7
Year ended	1992	12.8
Year ended	1993	17.7

Financings for Stand-alone PSNH

Required financings for Stand-alone PSNH (Pre-merger) at the First Effective Dates to implement the Joint Plan should produce the following net proceeds:

\$725 Million First Mortgage Bonds

\$125 Million Preferred Stock

\$487 Million Bank Debt

Stand-alone PSNH will require \$165 million more bank debt than New PSNH (Post-merger). This additional debt burden is within the range anticipated to be provided by commercial banks. Stand-

alone PSNH is not as strong financially or operationally as New PSNH, which would be owned and managed after the merger by the NU subsidiaries and affiliated companies. However, Stand-alone PSNH will be sufficiently viable to issue the required securities on a reasonable and timely basis.

G. THE COMMISSION IS NOT REQUIRED TO
FIND A RANGE OF REASONABLE RATES

Since the commission has found that the rates over the fixed rate period are just and reasonable, it is not necessary to find a range of reasonably possible rates in a subsequent rate proceeding as required by the court in the finance proceeding to complete construction of Seabrook. See Appeal of Conservation Law Foundation, 127 N.H. 606 at 640-41. If "fixed" rates increase due to base rate exceptions, or FPPAC "flow through", we have found that the rates are just and

reasonable over the seven year fixed rate period based on reasonable projections of operating revenues, expenses and investment base. The ROE collar assures the continued reasonableness of the Rate Agreement and resulting rates by limiting PSNH's allowed ROE to a predetermined high-low range during the seven year period.

H. CONTRACTS AMONG CURRENT AND FUTURE AFFILIATES

The commission has reviewed the following contracts with NU affiliate in connection with the reorganization under the joint plan:

Service contracts between NUSCO and PSNH, NUSCO and NAEC, NUSCO and NAESC, the Management Services Agreement, the Seabrook Power Contract between PSNH and NAEC Capacity Transfer Agreements from CL&P to PSNH, and from PSNH to CL&P, and the Sharing Agreement between PSNH and

the NU system.

The commission has the power to investigate contracts between affiliated public utilities, RSA 366:5. There are express requirements for filing such contracts by public utilities RSA 366:3. Any contract with a term of one year for the purchase of generating or transmission capacity, or energy must be filed with the commission. Section 2(c) of the Rate Agreement requires commission approval of the Seabrook Power Contract.

NUSCO has requested that the commission investigate each of the affiliate contracts, make findings that the terms of each contract are reasonable and approve each contract based on our review of contract terms and record evidence. We find that each of the affiliate contracts is reasonable as outlined below.

NUSCO Service Contracts

As set forth in service contracts, NUSCO will provide centralized accounting, administrative, data processing, engineering, financing, legal, operational, and planning services to PSNH, NAEC and NAESC at NUSCO's cost for these services. To the extent these services are provided by NUSCO to NU operating subsidiaries, each company will pay its pro rata share of the cost of the services. Noyes Pre-filed Direct Testimony, Ex. NU 3 at 33-35. The service contracts and cost allocations of services are subject to the jurisdiction of the SEC under the Public Utility Holding Act. 15 U.S.C. @79N.

NUSCO is able to provide services due to economies of scale at less cost than similar services contracted to outside sources. The service contracts provide a contractual basis for attaining the fossil steam unit availability,

energy expense, A&G and coal purchasing synergies outlined in Mr. Noyes Pre-filed Direct Testimony, Ex.NU 3 at 36-41 and Attachment 2. Performance by NUSCO of the service arrangement under the contracts is anticipated to result in economies, increased efficiencies and other benefits to the affiliates. We find the service contracts provide reasonable arrangements to assist PSNH, NAEC and NAESC in providing efficient utilization of combined resources.

Management Services Agreement

The Management Services Agreement has been approved by the Bankruptcy Court and FERC. On April 30, 1990, pursuant to Bankruptcy Court order, NUSCO began managing PSNH under the Management Services Agreement. The terms of the Agreement delegate responsibility to NUSCO for the management of PSNH's utility business and operations except

for the management of Seabrook, which awaits approval by the NRC and the Seabrook Joint Owners. Exhibit B to Merger Agreement, Ex. NU 1-E p. A-81.

The Management Services Agreement, provides essential services to Stand-alone PSNH during the interim period in a two-step plan between the First Effective Date and the merger in step 2, the second effective date. If the Merger Agreement is terminated, NUSCO is obligated to provide management for an estimated six months if requested by Stand-alone PSNH's Board of Directors. To assure the performance by PSNH of its obligations to the joint owners of Seabrook and to effect operating efficiencies in Seabrook's operations, NUSCO will provide services for up to five years after confirmation of the Joint Plan, if the merger does not occur. Ellis, Pre-filed Direct Testimony, NU 2 at pp. 23-

24. The Management Services Agreement is essential to the continued viability of Stand-alone PSNH as a stand-alone utility. We approve the Management Services Agreement as a reasonable and essential contract for the implementation of the Reorganization Plan.

Capacity Transfer Agreements and the Sharing Agreement

The Sharing Agreement and Capacity Transfer Agreements from CL&P to PSNH to CL&P to implement NU's undertaking to furnish system capacity to PSNH and to allocate savings resulting from the merger in the Sharing Agreement.

The method of effecting capacity transfers is outlined in Section 3 and 4 of the Rate Agreement. Ex. D Reorganization Plan pp. D-7-D-10, Ex. NU 1-E and was the subject of extensive testimony by Mr. Sabatino, Ex. NU 4, pp.15-16 and 23-62. Capacity costs,

transmission costs, and percentage of slice associated with the transfer of capacity from system companies to PSNH are detailed in Ex. F of the Rate Agreement. Ex. NU 1-E, pp D-111 - D-113. Savings from joint operation of the NU system and PSNH under the NEPOOL Agreement are divided equally between PSNH and the NU system. Section 4, Rate Agreement implemented by Section 7.3(C) of the Sharing Agreement.

The Sharing Agreement and Capacity Transfer Agreements are consistent with the Rate Agreement, establish a reasonable contractual basis for the joint planning and operation for the combined NU/PSNH System resulting in fair allocation of benefits and costs between PSNH and the NU System Companies.

I. REQUESTED STRUCTURAL CHANGES

NU requests the following "structural approvals" under the Rate Agreement and

the Joint Plan:

1. approval of the commencement of business by NAEC and the new NU subsidiary which will operate Seabrook referred to as "NUOP" or "NAESC," as public utilities in New Hampshire

2. approval of the merger of Northeast Utilities Acquisition Corporation ("NUAC") with and into PSNH. NUAC will not engage in any public utility business and NU does not seek this commission's approval for its commencement of business pursuant to 374:2. NUAC will cease to exist when the merger between NU and PSNH takes effect.

3. approval of certain mortgages over present and future property of PSNH and NAEC.

NAEC and NAESC are essential parties to successful implementation of the Joint Plan. Ex. NU 5, Busch Prefiled Direct Testimony at 95. NAEC has the sole purpose of replacing PSNH in its ownership share of Seabrook over rights and obligations defined under the Seabrook Power Contract discussed above and found to be in the public good. NAESC

or NUOP will have the sole purpose of replacing New Hampshire Yankee in the management, operation and maintenance of Seabrook. NU management of Seabrook discussed above was of paramount importance in achieving the projected rate levels. NU management of Seabrook will be conducted via NAESC and, accordingly, it will be in the public good to authorize NAESC to operate as a public utility. This authorization would be limited, as is currently NHY's authorization to operate as a public utility, to the management, operation and maintenance of the Seabrook project, and will not extend to its functioning as a franchised electric utility for the sale or distribution of electricity.

For similar reasons we approve the transfer of PSNH's Seabrook interest, including land and fuel, to NAEC, pursuant to RSA 374:30. The Joint Plan

and the Rate Agreement cannot function without this transfer taking effect, thereby facilitating the financing of the reorganization, minimizing PSNH's capital costs and maximizing tax benefits. Tr. Apr. 11 at 62-63; Tr. Apr. 30 at 23-28. The rights and obligations of PSNH and NAEC will be defined primarily under the terms of the Seabrook Power Contract which we have found to be in the public good.

NU has also asked for approval of the merger between PSNH and NU and is therefore a vital part of the reorganization process. As we have discussed above, the merger between NU and PSNH is of paramount importance to attainment of the projected synergies and, ultimately, to containment of the rate increases to the 5.5% projection and important to assure that the public good will be served. For these reasons we

find that the merger of NUAC with and into PSNH is in the public good and is hereby approved.

Finally, NU requests commission approval pursuant to RSA 369:2 for PSNH and NAEC to mortgage their present and future property to secure the bonds and notes referred to elsewhere in this report regarding the requested financing approvals. This mortgaging will allow PSNH and North Atlantic to effectuate the financings required by the Joint Plan. NU Trial Brief at 112; Ex. NU 5, Busch Prefiled Direct Testimony at 102-103. The requested approval is a vital part of the proposed financings and is in the public good. Accordingly, we hereby grant the requested approval.

J. NU MANAGEMENT

The acquisition of PSNH by a major New England electric utility is a pragmatic resolution of the unfortunate

bankruptcy of PSNH. Northeast Utilities is the parent company of the NU system, which includes three electric operating subsidiaries, the Connecticut Light and Power Company, Western Massachusetts Electric Company and Holyoke Water Power Company. Support subsidiaries include Northeast Nuclear Energy Company. (nuclear operations) and Northeast Utilities Service Company (system wide service). Northeast Utilities is one of the largest utilities in the U.S. and the largest in New England, with 8,300 employees serving 1.25 million customers in Connecticut and Western Massachusetts. Net utility plant is \$5.3 billion. In 1989 electric generating capacity was 5,964 MW of which 3268 MW were from four nuclear plants, with the balance of capacity from fossil fuel plants (36%), hydro (3%) and cogeneration. (Northeast Utilities Annual Report 1989, Ex. NU 12,

Disclosure Statement, Ex. NU 1-E at p. 77, Ellis, Ex. NU 2, pp. 2-3)

The commission considers the management of NU a substantially significant reason for finding that the acquisition of PSNH by NU under the applicable terms of the Joint Reorganization Plan and the Rate Agreement serves the public good. NU management has demonstrated its administrative competence in managing the NU system successfully, and in its particular expertise in managing nuclear power generation as a major part of its overall capacity. Mr. Fakonas emphasized NU's high level of performance in operating its nuclear plants. Good management will importantly contribute to the safe and efficient operation of Seabrook. NU's nuclear organization and technical capabilities was described in detail by Mr. Opecka. Mr. Noyes and Mr.

Sabatino evaluated the ability of the company to attain operating efficiencies largely resulting from the merger. Mr. Ellis emphasized the importance of management strategy to develop a consensual reorganization ultimately resulting in NU's plan being adopted by the State, Bankruptcy Committees, and the Bankruptcy Court as the compromise plan that would best serve the public interest. Mr. Ellis further demonstrated management's utilization of its resources to maintain over the long term a reliable, reasonably priced, supply of electricity to serve ratepayers. Mr. Busch presented a detailed financial overview of the joint plan forecasts of financial conditions based on multiple reasonable assumptions and a realistic, creative financial plan to maintain just and reasonable rate levels. Mr. Busch demonstrated financial management

competence to implement the financing and establish a workable corporate structure for effective administration of reorganized PSNH and North Atlantic. Mr. Curley testified that NU's management strength is recognized in financial markets and will enhance the prospect of successfully financing the \$2.3 billion acquisition through NU's and PSNH's combined resources and external financing of debt, preferred stock and equity.

Through the difficult and complex negotiations in the bankruptcy proceeding, in effectively securing the approval of the New Hampshire Legislature in its enactment of RSA 362-C and in presenting comprehensive evidentiary support for the joint plan before this commission, NU has demonstrated a capability for strategic long term planning that provides assurance that its plan to acquire and manage PSNH is

workable. NU has also demonstrated its capability of managing consistent with the standards and requirements of the state and federal regulatory process to provide electric service without the intervention of financial impairment of its operations. /

We have adopted the Rate Agreement based on our analysis of its merits. We believe that NU's competent management will enable reorganized PSNH and NAEC to finance the plan, apply revenues from reasonable rates within the ambit of the Rate Agreement to support the resulting capitalization and assure post-merger that the public good will continue to be served consistent with a reliable electricity supply at a reasonable price to serve the New Hampshire economy and electricity customers.

K. CONCLUSION

The implementation of the Rate Plan

as set forth herein is consistent with the public good. Based on substantial evidence and analysis the commission has determined that the reorganization proposal in the Joint Plan and the Rate Agreement will result in just and reasonable rates that equitably balance the interests of ratepayers and investors, will fairly resolve the PSNH bankruptcy and will establish a workable system for providing reliable electric service.

However, we recognize that a seven year forecast of rates is vulnerable to changes in economic trends, inflation and unforeseeable operation problems causing inexorable pressure on forecasted rates and various components of the Rate Plan. As a practical matter, the costs embodied in the rate paradigm may escalate beyond projections causing a greater than 5.5% annual compounded increase in rates over

the seven year fixed term of the Agreement.

There are other variables and imponderables involved in predicting an uncertain future. If FERC does not approve a merger of NU and PSNH on a timely and acceptable basis to NU and PSNH, the State, the Equity and Creditor's Committees or the Bankruptcy Court, PSNH ratepayers are at risk by Stand-alone PSNH undertaking to provide electric service, albeit in accordance with the Rate Plan and this commission's continuing jurisdiction. As we have previously observed, there is also substantial risk that during the interim period (from the First Effective Date until FERC rules on the merger), the Reorganization and Rate Plan may not be consummated on terms consistent with the public good. Illustrative of the problem is that an estimated \$500 million of

synergies or efficiencies resulting from the merger would not transpire with a Stand-alone PSNH, costs of operating and financing will increase, and the 5.5% annual seven-year trajectory would be imperilled. If Seabrook does not operate as efficiently as anticipated, or operates at less than the assumed 60-70% capacity factors, or if fuel expenses are more volatile on the high side, costs flowing through FPPAC to the ratepayers will accelerate. If peak load demand does not approach 2.3%, pressures on base rates will increase. The commission will exercise constant regulatory oversight to assure, within the limits of feasibility, that NU's management will adhere to the rate path anticipated by the Rate Plan and the New Hampshire Legislature RSA 362-C.

IV. REQUESTED FINDINGS

NU, the State and the Hydro

intervenors filed requests for findings, approvals and rulings of law. NU filed a response to Hydro Intervenors' Request for Findings of Fact and Rulings of Law on July 3, 1990. Nu's requested findings and requested approvals, files as Attachment 1 to their Trial Brief dated June 8, 1990, are:

A.NU'S REQUESTED FINDINGS OF FACT:

1. The implementation of the Rate Agreement is consistent with the public good. The Commission determined that the reorganization proposal contained in the Joint Plan will result in rates for electric service which reasonably balance the interests of consumers and investors, a prompt resolution to the PSNH bankruptcy and the establishment of a sound system for the furnishing of electric service. This ultimate finding is based on the totality of the substantial evidence presented on the record which supports the following specific findings:

a. The rates anticipated under the Rate Agreement for the seven-year fixed rate period are affordable, reasonably balance the competing interests of consumers and investors so that investors will realize a

reasonable return and ratepayers will not suffer an undue burden, and will permit PSNH to support its anticipated capitalization for such years.

b. The range of rates projected for the years following the seven-year fixed rate period are affordable, reasonably balance the competing interests of consumers and investors, and will permit PSNH to support its anticipated capitalization for such years.

c. The assumptions and projections upon which the Rate Agreement is based, including but not limited to the load forecast and NU's 20-year Load and Resource Plan, are reasonable. Moreover, the Commission finds that the 20-year Load and Resource Plan submitted by NUSCO provides adequate assurances that NU will have available sufficient supply-side options at reasonable cost to meet the energy needs of New Hampshire for 20 years. Based on this finding, the Commission approves the 20-year Load and Resource Plan in accordance with Section 3(d) of the Rate Agreement.

d. The establishment and amortization of the regulatory asset known as the "acquisition premium" are reasonable and facilitate the resolution of the PSNH bankruptcy by achieving a balance between PSNH investors'

demands for prompt recovery of their investment and the ratepayers' interest in maintaining affordable rates.

e. The FPPAC, and the assumptions and projections upon which it is based, are reasonable, provide for a fair balancing of investor and ratepayer interests and facilitate the resolution of the PSNH bankruptcy.

f. The Seabrook Power Contract is reasonable, ensures a fair balance of investor and ratepayer interests in the event that Seabrook Unit I operates or is canceled, and results in reasonable charges to PSNH and to PSNH's ratepayers.

g. The ROE collar provisions are reasonable and provide protections against both ratepayer exploitation and confiscation of utility property.

h. The provisions of Sections 5(a) of the Rate Agreement which permit modifications of base rates in certain circumstances are reasonable.

i. The provisions of Section 3 of the Rate Agreement which require NU system companies to provide capacity to PSNH are reasonable and ensure that PSNH will have sufficient electricity to meet anticipated ratepayer demands.

j. The issuance of the securities

and other financings of PSNH and NAEC contemplated by the Joint Plan and the resulting capitalizations of these utilities are reasonable, permit the resolution of the PSNH bankruptcy, are supported by the rates provided for in the Rate Agreement and are in the public good.

k. The capital structure resulting from the issuance of the securities and other financings contemplated by the Joint Plan will not exceed the fair cost of the property reasonably requisite for present and future use to supply reliable electric service in the future to the New Hampshire ratepayers and its economy, plus the acquisition adjustment established by the Rate Agreement.

l. The capitalization ratios and capital structure resulting from the issuance of the securities and other financings contemplated by the Joint Plan are reasonable and are justified by the special circumstances of the case.

m. The provisions in Section 8 of the Rate Agreement relating to Seabrook decommissioning charges and the pass-through of such charges to customers are reasonable.

2. The acquisition of PSNH by NU will result in at least \$300 million in capitalized synergies. Therefore,

the commission finds that upon consummation of the NU acquisition of PSNH, the Investment Adder, as that term is defined in the Rate Agreement, shall equal \$300 million for the entire period that the ROE collar remains in effect and shall not be subject to further review or modification by the Commission. No party has presented evidence of the amount of capitalized synergies which would be realized by Stand-alone PSNH in the event that the NU acquisition is not consummated. Therefore, the Commission finds that the value of such capitalized synergies shall equal \$0, provided that the Commission may determine in a later proceeding brought by PSNH that synergies should be included in the Investment Adder for Stand-alone PSNH.

3. The term "costs associated with conservation and load management programs" in section 5(a)(v)(D) of the Rate Agreement includes any and all direct program costs incurred by PSNH to implement conservation and load management programs in excess of those included in the current projections of the Rate Agreement. In addition, such term includes lost fixed cost recovery and incentives for C&LM to the extent determined by the Commission in this or any other proceeding.

4. The Joint Recommendations for Commission Order submitted to the Commission by NUSCO and the Office of the Attorney General are reasonable and consistent with the

public good and are hereby adopted.

B. NU'S REQUESTED APPROVALS

NUSCO requests that the Commission i
issue the following approvals which are
necessary to implement the provisions of
the Rate Agreement in accordance with
RSA 362-C:3:

1. The temporary 5.5 percent surcharge approved by the Commission in Order No. 19,655 in Docket No. DR 89-219, dated December 28, 1989, is just and reasonable and is hereby approved as a permanent rate of PSNH pursuant to Section 5(a)(i) of the Rate Agreement.

2. The six 5.5 percent rate increase to be effective pursuant to Section 5 of the Rate Agreement over the six-year period beginning on the later of the First Effective Date or January 1, 1991 are just and reasonable and are hereby approved. These rates shall become effective as permanent rates of PSNH as of the dates provided for in the Rate Agreement.

3. The Investment Adder of \$300 million for PSNH upon acquisition by NU is reasonable and is hereby approved.

4. The commencement of business as a public utility by NAEC is for the

public good and is hereby approved.

5. The commencement of business as a public utility by NAESC is for the public good and is hereby approved.

6. The acquisition of PSNH by NU in accordance with the Joint Plan is in the public good and is hereby approved. The Commission hereby finds in accordance with RSA 374:32 that the public good does not require that this transfer be authorized by a 2/3 vote of the stockholders of PSNH or NU.

7. The transfer by PSNH to NAEC of its ownership interest in the Seabrook plant, the land currently owned by PSNH surrounding the Seabrook site and Seabrook's nuclear fuel is for the public good and is hereby approved. The Commission hereby finds in accordance with RSA 374: 32 that the public good does not require that this transfer be authorized by a 2/3 vote of the stockholders of PSNH or NAEC.

8. The Service Contract between NUSCO and PSNH in substantially the form submitted to the Commission under which NUSCO will provide management, financial, planning, accounting and other services at NUSCO's cost is reasonable and is hereby approved as in the public good.

9. The Service Contract between NUSCO and NAEC in substantially the form submitted to the Commission under which NUSCO will provide

management, financial, planning, accounting and other services at NUSCO's cost is reasonable and is hereby approved as in the public good.

10. The Service Contract between NUSCO and NAESC in substantially the form submitted to the Commission under which NUSCO will provide management, financial, planning, accounting and other services at NUSCO's cost is reasonable and is hereby approved as in the public good.

11. The Seabrook Power Contract between PSNH and NAEC in substantially the form submitted to the Commission is reasonable and is hereby approved as in the public good.

12. The Capacity Transfer Agreements between PSNH and the NU system companies in substantially the form submitted to the Commission are reasonable and in the public interest and is hereby approved as in the public good.

13. The Sharing Agreement between PSNH and the NU system companies in substantially the form submitted to the Commission is reasonable and in the public interest and is hereby approved as in the public good.

14. The Management Services Agreement between PSNH and NUSCO which was filed with the Commission is reasonable and is hereby approved as in the public good.

15. With respect to the securities to be distributed to creditors and shareholders (the "Distribution Securities") at Step 1 financings (the "Financings"), the Commission finds as follows:

a. The issuance of common stock by PSNH at the effective date of the Joint Plan (the "Effective Date"), and from time to time thereafter in the form of stock dividends, in accordance with the terms of the Joint Plan and the proposed Amended Articles of Incorporation for PSNH submitted to the Commission, is consistent with the public good, and PSNH is authorized to issue said shares of common stock, both at the Effective Date and from time to time thereafter, pursuant to the Joint Plan, in the respective amounts determined in accordance with the terms of the Joint Plan.

b. The issuance of contingent notes by PSNH at or after the Effective Date, in accordance with the terms of the Joint Plan and the proposed form of indenture (the "Contingent Note Indenture") is consistent with the public good, and PSNH is authorized to issue contingent notes having an aggregate principal amount of \$205 million (or such lesser amount as shall be determined in accordance with the Joint Plan) pursuant to the Joint Plan in one, two or three series, bearing an interest rate set in accordance with the terms

of the Joint Plan.

c. The issuance of contingent warrant certificates by PSNH at the Effective Date, in accordance with the terms of the Joint Plan and the form of contingent warrant agreement (the "Contingent Warrant Agreement"), is consistent with the public good, and PSNH is authorized to issue said certificates pursuant to the Joint Plan in the amounts determined in accordance with the Joint Plan.

d. The proposed Amended Articles of Incorporation of PSNH, in substantially the form approved by the Bankruptcy Court and filed with the Commission and the proposed Contingent Note Indenture and the Contingent Warrant Agreement, in each case in substantially the form submitted to the Commission, are consistent with the public good, and PSNH is authorized to effect the Amended Articles of Incorporation and to enter into the contingent Note Indenture and the Contingent Warrant Agreement.

e. PSNH is authorized to issue the securities and incur the bank borrowings described in paragraphs 15(g) through 15(m) upon such terms as may be established by or on behalf of PSNH at the time of issuing such securities or effecting such borrowings, so long as the initial embedded cost to PSNH of

such securities and borrowings, including insurance expenses, does not exceed 11.50 percent per annum.

f. The aggregate principal amount of first mortgage bonds and pollution control revenue bonds which may be issued pursuant to paragraphs 15(i) through 15(1) is limited to an aggregate principal amount for \$825 million (plus such additional amounts of first mortgage bonds as may be required to provide security for the Letter of Credit and Reimbursement Agreement that may be issued in support of the taxable pollution control revenue bonds), to be allowed among such debt securities (up to the limits specified in such paragraphs) at the discretion of PSNH.

g. Subject to paragraph (e), the issuance and sale of 5,000,000 shares of a new series of PSNH preferred stock, \$25 par value, (the "Series A Preferred Stock") by PSNH at the Effective Date, in accordance with the proposed Amended Articles of Incorporation and the testimony submitted to the Commission, is consistent with public good, and PSNH is authorized to issue the Series A Preferred Stock to the public through one or more underwriters at par.

h. The proposed amendment of PSNH's General and Refunding

Mortgage Indenture dated as of August 15, 1978 to Bank of New England, N.A. (formerly New England Merchants National Bank) as trustee, as heretofore supplemented and amended, substantially in accordance with the form of Tenth Supplemental Indenture and Schedule A thereto (the "Tenth Supplemental Indenture") submitted to the Commission is consistent with the public good, and PSNH is authorized to effect said amendment.

i. Subject to paragraphs (e) and (f), the issuance and sale of up to \$400 million of first mortgage bonds by PSNH at the Effective Date, pursuant to the Tenth Supplemental Indenture and in accordance with the testimony submitted to the Commission, is consistent with the public good, and PSNH is authorized to issue and sell said first mortgage bonds at the principal amount to one or more underwriters.

j. Subject to paragraphs (e_ and (f), the issuance of up to \$120 million of tax exempt pollution control revenue bonds by the New Hampshire Industrial Development Authority (the "IDA") on behalf of PSNH at the Effective Date, the borrowing of PSNH of the proceeds of such issuance and the issuance by PSNH pursuant to the Tenth Supplemental Indenture of first mortgage bonds to a trustee for the benefit of the

holders of such revenue bonds, in accordance with a Loan and Trust Agreement in substantially the form submitted to the commission and the testimony submitted to the commission, are consistent with the public good, and the issuance of such revenue bonds in one or more series, the execution of the Loan and Trust Agreement, the borrowing by PSNH of the proceeds therefrom, and the issuance by PSNH of first mortgage bonds as security therefor, are hereby authorized.

k. Subject to paragraphs (e) and (f), the issuance of up to \$232.5 million of tax exempt pollution control refunding revenue bonds by the IDA on behalf of PSNH at the Effective Date, the borrowing by PSNH of the proceeds of such issuance and the issuance by PSNH pursuant to the Tenth Supplemental Indenture of first mortgage bonds to a trustee for the benefit of the holders of such revenue bonds, in accordance with a Loan and Trust Agreement in substantially the form submitted to the Commission, are consistent with the public good, and the issuance of such revenue bonds in one or more series, the execution of the Loan and Trust Agreement, the borrowing by PSNH of the proceeds therefrom, and the issuance by PSNH of the first mortgage bonds as security therefor, are hereby authorized.

l. Subject to paragraphs (e) and

(f), the issuance of up to \$300 million of taxable pollution control revenue bonds by the IDA on behalf of PSNH at the Effective Date, the borrowing by PSNH of the proceeds of such issuance and the issuance by PSNH pursuant to the Tenth Supplemental Indenture of first mortgage bonds to a trustee for the benefit of the holders of such revenue bonds or to or for the benefit of the issuer of letters of credit supporting the bonds, in accordance with a Loan and Trust Agreement and a Letter of Credit and Reimbursement Agreement in substantially the respective forms thereof submitted to the Commission and the testimony submitted to the Commission, are consistent with the public good, and the issuance of such revenue bonds in one or more series, the execution of the Loan and Trust Agreements, the borrowing by PSNH of the proceeds therefrom, and the issuance by PSNH of first mortgage bonds as security therefor and for PSNH's obligations to the letter of credit issuer, are hereby authorized.

m. Subject to paragraph (e), the borrowing by PSNH of up to \$487 million from a group of banks under a term loan facility at the Effective Date, in accordance with a Term Loan Credit Agreement in substantially the form submitted to the Commission and the testimony submitted to

the Commission, is consistent with the public good, and PSNH is authorized to effect such borrowings from such banks pursuant to such facility.

n. The borrowing of up to \$200 million from time to time by PSNH from a group of banks under a revolving credit facility, in accordance with a Revolving Credit Agreement in substantially the form submitted to the Commission and the testimony submitted to the Commission, is in the public good, and PSNH is authorized to effect such borrowing from time to time from such banks pursuant to such facility.

16. While Commission approval of the specific proposed Step 2 financings (i.e., the issuance of common stock by PSNH, NAEC and NAESC to NU and the issuance of first mortgage bonds by NAEC) is not requested at this time, those proposed financings were considered by the Commission in this proceeding based upon the information available as to it at this time. Based upon that review, and in consideration of the commission's right to approve the specific financings in the future as Step 2 becomes imminent, the Commission concludes that such financings, as components of the overall financing plan outlined in testimony before the Commission, are conceptually consistent with the public good and lend support to the Commission's finding as to the Rate

Agreement under RSA 362-C:3.

17. PSNH shall use the proceeds of the security issuances and the bank borrowings approved in section 15 above to finance the cash requirements of the first step of the Plan.

18. With respect to the security to be provided by PSNH in connection with the security issuances and the bank borrowings approved in section 15 above, the Commission finds as follows:

a. The proposed amendment and restatement of PSNH's General and Refunding Mortgage Indenture to become the first mortgage indenture of PSNH in accordance with the terms of the Plan and the Tenth Supplemental Indenture and the testimony provided to the Commission, and the continued mortgage by PSNH thereunder of substantially all of its present and future property, tangible and intangible, including franchises, but excluding its interest in Seabrook, to secure the payment of the first mortgage bonds to be issued thereunder is consistent with the public good and is hereby approved.

b. The proposed second mortgage to be granted by PSNH of substantially all of its present and future New Hampshire property, tangible and intangible, including franchises, subject to the first mortgage

indenture referred to in paragraph (a) above, to secure payment of the Term Loan Credit Agreement and Revolving Credit Agreement referred to in paragraphs 15(m) and 15(n), in accordance with a second mortgage in substantially the form submitted to the Commission and in accordance with the testimony provided to the Commission, is consistent with the public good and is hereby approved.

c. The proposed first mortgage to be granted by PSNH of certain present and future property, both tangible and intangible, and including franchises, relating to the Seabrook nuclear power plant, to secure payment of the Term Loan Agreement and Revolving Credit Facility referred to above, in accordance with a Seabrook mortgage in substantially the form submitted to the Commission and the testimony submitted to the Commission, is consistent with the public good and is hereby approved.

19. The Commission's Seventh Supplemental Order No. 17,222 in Docket No. DF 84-167, the Commission ordered that PSNH "is prohibited from declaring or paying preferred and common stock dividends unless such a declaration or payment is specifically authorized by further order of this Commission." The Commission finds that this prohibition is no longer necessary

or appropriate and is hereby rescinded and shall be of no further force or effect.

NU's requested findings and approvals are consistent with the foregoing report and analysis and are approved.

C. STATE'S REQUESTED FINDINGS

The requested findings of the State of New Hampshire for Order Approving the Rate Agreement, filed on June 18, 1990, and listed above on pages 28-31 are likewise consistent with the foregoing report and analysis and are hereby approved with two exceptions. The State's third requested finding of fact which reads as follows:

The Annotated Rate Agreement submitted by the State is unchallenged as an accurate summary of the meaning to be ascribed to the Rate Agreement. The Annotated Rate Agreement and the accompanying glossary are adopted as the authoritative reference guide to the Rate Agreement. (AG-2: Kessler Prefiled Testimony, Vol. II.)

Although the annotations in Ex. AG-2 appear to be consistent with this report and order and was not challenged by any party, we cannot ascribe the same weight to the annotations as we do to the explicit wording of the Agreement itself. Otherwise, the requested findings of the State are approved.

Second, as noted above, the State's request for a Supplemental Finding of Fact will be addressed at the time NU files its detailed accounting of book value and the Acquisition Premium at the First Effective Date.

D. HYDRO INTERVENORS' REQUESTED FINDINGS

The Request for Findings of Fact and Request for Rulings of Law filed by the Hydro Intervenors on June 8, 1990, are granted in part and denied in part. The Hydro Intervenors' requests for findings of fact along with respective commission analysis and rulings are as follows:

1. In effect, implementation of the Rate Agreement will result in recovery of \$1.5 billion, or slightly more than 50%, of PSNH's Seabrook investment of approximately \$2.9 billion.

NU objected to this request. We grant the request only insofar as the record indicates that, from an investor standpoint, the Rate Agreement, when considered as a whole, reflects in effect recovery of \$1.5 billion, or the equivalent of slightly more than 50%, of PSNH's Seabrook investment. Tr. May 14 at 72. Dollars are fungible and the source of the funds does not so much matter to the investors as the bottom line return on their investment. However, the request is denied in that the value assigned to Seabrook under the Rate Agreement is \$700 million, not \$1.5 billion. As indicated by NU in its objection, treatment of the Acquisition Premium as part of the recovery of PSNH's Seabrook investment is

not supported by the record, is inconsistent with the intent of the parties and would jeopardize the 5.5% rate projections in the Agreement.

Tr. May 24 at 72-73, Tr. April 7 at 177, Tr. April 18 at 94-95, Tr. April 20 at 101, 106-109.

2. The \$700 million value assigned to Seabrook under the Rate Agreement is a negotiated value which has no rational basis other than being a value to accomplish all the things NU wanted to accomplish in the Rate Agreement.

The fact that the \$700 million value for Seabrook was negotiated does not mean that there was no rational basis for it. There was testimony that the \$700 million amount approximates Seabrook's market value and that said value could be used for ratemaking purposes in a Seabrook rate case. Ex. Staff-1, Prefiled Direct Testimony of James T. Rodier at 7 and 10. Tr. April 18, at 223-24. Also, as NU

asserted in its objection to this requested finding, the record citations by the Hydro Intervenors in support of its request demonstrate and the \$700 million value assigned to Seabrook reflects an attempt by the parties to maintain a 5.5% rate path and zero level FPPAC charges. Accordingly, this request is denied.

3. NU does not assign the acquisition premium either to the Seabrook assets or to the non-Seabrook assets.

This request was not challenged. It appears to be consistent with the record and with the foregoing report and analysis and is therefore granted.

4. The \$800 million "acquisition premium" is not related to, and not justified by, the "synergies" that NU claims will result from the acquisition of PSNH.

No party objected to this request. It is true that the Acquisition Premium was not calculated based on the aggregate savings

attributable to synergies. To this extent, the requested finding is granted. However, the savings attributable to the synergies are of paramount importance to whether projected 5.5% annual rate increases will support the \$2.3 billion dollar capitalized value of the company, including the Acquisition Premium. Accordingly, this requested finding is denied to the extent that it is inconsistent with this analysis and the foregoing report.

5. The \$800 million "acquisition premium" cannot be characterized as an acquisition adjustment in the traditional utility ratemaking sense of a premium paid for assets above their depreciated original cost.

To the extent that the record indicates that the "acquisition premium" was calculated solely as the difference between the \$2.3 billion value required to resolve the bankruptcy and the sum of the Seabrook and non-Seabrook values, it

was not derived in the traditional utility ratemaking sense of the premium paid for assets above their depreciated original cost. However, the commission agrees with NU's assertion that the Acquisition Premium would also be justified if it were calculated in its traditional ratemaking sense. Accordingly, this request is denied. NU Trial Brief at 27-29.

6. The treatment of \$800 million of the \$2.3 billion purchase price as an acquisition premium or acquisition adjustment is not justified on the record under traditional accounting principals.

NU objects to this request. The commission agrees with NU that the request is not supported by the record. It was Staff Witness Sullivan's opinion that the accounting treatment of the acquisition premium in the Rate Agreement is consistent with Generally Accepted Accounting Principles. The Acquisition

Premium is a regulatory asset created by the Rate Agreement. Authorization of the Acquisition Premium creates substantial cash flow limiting the need for external financing and contributes to lower financing costs and lower rates. Tr. Apr. 19 at 33-36. The accounting treatment of the Acquisition Premium rationally serves the balanced interest of ratepayers and investors in an effective rate plan. Accordingly, this requested finding is denied.

7. Regardless of what it is called, where it is placed as an asset, or how quickly it is amortized, the \$800 million "acquisition premium" represents additional Seabrook costs (beyond the \$700 million assigned value of Seabrook) recovered under the Rate Agreement.

This request is denied for, inter alia, the reasons cited supra in response to Hydro intervenors' first and second requests for findings of fact. NU's objection to this request is granted.

The Hydro intervenors made three requests for rulings of law:

1. The Commission is required to employ some rational method and to identify fully and accurately its method for determining reasonable rates, including its calculation of rate base and rate of return.

2. The statutory basis for calculation of rate base is "the cost of the property of the utility used and useful in the public service less accrued depreciation." RSA 378:27, 28; Appeal of Public Service Co., 130 N.H. 748, 751 (1988).

3. The special statute enacted by the legislature that governs this case, RSA Ch.362-C, does not supersede traditional ratemaking principles under New Hampshire Law.

a. Statutes in pari materia are to be construed together. State Employees' Association v. Public Employee Labor Relations Board, 118 N.H. 885, 890 (1978)

b. In the absence of clear evidence to the contrary, a new statute will not be deemed to effect a repeal by implication of an existing statute. Arnold v. City of Manchester, 119 N.H. 859, 863 (1979).

There were no objections filed to

Request No. 1 and NU objected to Request Nos. 2 and 3. Request No. 1 is granted. The commission is obligated to and has demonstrated a rational basis for its decisions in this proceeding and for its findings that rates are just and reasonable.

Request No. 2 is denied in that it does not go far enough in finding the statutory basis for the calculation of rate base. RSA 362-C:3 provides, in pertinent part, that the commission, if it first determines that implementation of the rate agreement will be consistent with the public good, shall, "notwithstanding any other provision of law, establish and place into effect the level of rates, fares, or charges...in accordance with...the agreement... ." (emphasis added.) This provision, among other things, would allow CWIP to be reflected in the rates under the plan

notwithstanding the so-called anti-CWIP statute. RSA 378: 30-a.

The third requested ruling of law is granted in part and denied in part. As discussed above regarding the Hydro intervenors' request for ruling of law, RSA 362-C: 3 (and RSA 362-C:4 regarding temporary rates) provided that, to the extent the commission finds the Rate Agreement to be consistent with the public good, that it shall implement the Agreement "notwithstanding any other provision of law." To the extent that the commission can authorize said implementation of the Rate Agreement consistent with traditional ratemaking principles under New Hampshire law, this requested finding is granted. This was made clear in all of the scoping orders to date in this proceeding. To the extent that implementation of the Rate Agreement is not possible under traditional

ratemaking principles under New Hampshire law, as may be the case in the application of RSA 378:30-a, the requested finding is denied.

Our order will issue accordingly.

Concurring:

July 20, 1990

John N. Nassikas
Special Commissioner

Bruce B. Ellsworth
Commissioner

Linda G. Bisson
Commissioner

DR 89-244

REORGANIZATION OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
ORDER NO. 19,889

Base on the foregoing Report, which is made a part hereof, it is hereby

ORDERED, that NUSCO's requests for findings of facts, dated June 9, 1990, are consistent with the commission analysis in the foregoing report, are consistent with the public good, and are hereby granted; and

FURTHER ORDERED, that the requested approvals filed by NUSCO on June 8, 1990, are consistent with the commission analysis in the foregoing report, are consistent with the public good, and are hereby granted; and

FURTHER ORDERED, that, as set forth in the foregoing report, our approval of the Twenty Year Load and Resource Plan

filed by NU pursuant to Section 3(d) of the agreement does not relieve NU from its obligation to implement least cost planning as specified by the commission, or limit, in any way, the right of the commission to set just and reasonable rates; and of the commission to set just and reasonable rates; and

FURTHER ORDERED, that NU/PSNH shall comply with all existing and any future least cost integrated planning or any other resource planning requirements of the commission; and

FURTHER ORDERED, that the requested findings of the State of New Hampshire for an Order Approving the Rate Agreement, filed on June 18, 1990, are consistent with the commission analysis in the foregoing report and are hereby approved with the exception of (1) the state's third requested finding of fact which asked the commission to accept the

Annotated Rate Agreement and the accompanying glossary as the "authoritative reference guide to the rate agreement." which is denied insofar as the commission cannot ascribe the same weight to the annotations as is ascribed to the explicit wording of the agreement itself; and (2) the state's supplementary request for a finding of fact regarding NU's fees, expenses and obligations incurred prior to the first effective date which will be determined when NU files its detailed accounting of net book value and the acquisition premium; and

FURTHER ORDERED, that the Hydro Intervenors' requests for findings of facts are denied, for reasons set forth in the foregoing report and analysis, with the following three exceptions:

1. The Hydro Intervenors' Third Request for Finding of Fact that 'NU does not assign the acquisition premium either to the Seabrook assets or to the non-Seabrook

assets," is consistent with the record and with the foregoing report and analysis and is granted.

2. The Hydro Intervenors' First Request for Finding¹ is granted insofar as the record indicates that, from an investor's standpoint, the Rate Agreement, when considered as a whole, reflects in effect recovery \$1.5 billion or the equivalent of slightly more than fifty percent of PSNH's Seabrook investment. The request is denied in that the value assigned to Seabrook under the Rate Agreement is \$700 million, not \$1.5 billion. Treatment of the Acquisition Premium as part of the recovery of PSNH's Seabrook investment is not supported by the record, is inconsistent with the intent of the parties and would jeopardize the 5.5% percent rate projections set forth in the Rate Agreement.

3. Hydro Intervenors' Fourth Request for Findings of Fact, that the "\$800 million 'acquisition premium' is not related to and not justified by the 'synergies' that NU claims will result from the acquisition of

¹ The Hydro Intervenors' First Request for Finding was: "in effect, implementation of the Rate Agreement will result in recovery of \$1.5 billion, or slightly more than fifty percent, of PSNH's Seabrook investment of approximately \$2.9 billion.

PSNH," is granted in that the acquisition premium was not calculated based on the aggregate savings attributable to synergies. This requested finding is denied insofar as it is inconsistent with the foregoing report and our finding that the savings attributable to the synergies are of paramount importance to the ability of the projected 5.5 percent annual rate increases to support \$2.3 billion dollar cumulative value of PSNH; and

FURTHER ORDERED, that the Hydro Intervenor's First Request for a Ruling of Law² is granted for reasons cited in the foregoing report; and

FURTHER ORDERED, that the Hydro Intervenor's Second Request for a Ruling of Law³ is denied for the reasons set

²The Hydro Intervenor's First Request for a Ruling of Law is that the "commission is required to employ some rational method and to identify fully and accurately its method for determining reasonable rates, including its calculation of rate base and rate of return.

³The Hydro Intervenor's Second Request for a Ruling of Law is: "...the statutory basis for calculation of rate base is 'the cost of the property of the utility used and useful so in the public

forth in the foregoing report; and

FURTHER ORDERED, that the Hydro Intervenor's Third Requested Ruling of Law provides that the special statute enacted by the Legislature that governs this case, RSA Ch. 362-C, does not supersede traditional rate-making principles under New Hampshire law, is granted in part and denied in part. It is granted to the extent that the commission can authorize said implementation of the Rate Agreement consistent with traditional rate-making principles under New Hampshire law. It is denied to the extent that implementation of the Rate Agreement is not possible under traditional rate-making principles under New Hampshire law, as may be the case in the

service less accrued depreciation.' RSA 378:27, 28; Appeal of Public Service Company,, 130 N.H. 748, 751 (1988)."

application of the so-called anti-CWIP statute, RSA 378:30-a; and

FURTHER ORDERED, that pursuant to RSA 362-C:3, the commission hereby finds that the implementation of the agreement would be consistent with the public good and the levels of rates, fares or charges and the fuel and purchased power adjustment clause shall be place into effect as appropriate in accordance with, and during the time period set forth in, the agreement; and

FURTHER ORDERED, that the commission findings above, granting various requested findings of fact and approvals by the parties, were made in the context of the commission analysis and interpretation set forth in the foregoing report and are not necessarily consistent with the position of the party making the request; and

FURTHER ORDERED, That PSNH consult

with the commission staff and propose a schedule for a rate design proceeding by January 1, 1991, in accordance with the foregoing report, and

FURTHER ORDERED, that PSNH shall file a detailed accounting of the reorganization, including severance payments to employees and senior management. Such accounting shall provide a calculation of the net book value, as described in Exhibit A to the Third Amended Joint Plan of Reorganization, Ex. NU 1E at A-37 and A-38, and the acquisition premium of the new company at the First Effective Date, including an account of severance payments to employees and senior management and an accounting of all fees, expenses and obligations incurred by NU in the resolution of the PSNH bankruptcy and proposed acquisition and the dates incurred and paid; and

FURTHER ORDERED, that upon consummation of the merger, PSNH will consult with the commission staff regarding the monthly and periodic reports that will be required for ongoing commission review of fuel and purchased power costs, rates of return earned and the return on equity collar calculations.

By order of the Public Utilities Commission of New Hampshire this twentieth day of July, 1990.

JOHN N. NASSIKAS
John N. Nassikas
Special Commissioner

BRUCE B. ELLSWORTH
Bruce B. Ellsworth
Commissioner

LINDA G. BISSON
Linda G. Bisson
Commissioner

Attested by:

WYNN E. ARNOLD
Wynn E. Arnold
Executive Director and Secretary

Appendix A [to Commission Report]

STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Petition of Northeast Utilities)

Service Company)

Re Public Service Company of) Docket No

New Hampshire Reorganization) DR 89-244

Joint Recommendation for Commission Order

NOW COMES Northeast Utilities Service Company ("NUSCO") and the Office of the Attorney General (referred to herein collectively as the "Undersigned Parties") and state as follows:

A. Introduction

The Undersigned Parties have reached certain agreements with respect to the proper intent and interpretation of the Rate Agreement. Such agreements do not result in amendments to the Rate Agreement. The Undersigned Parties recommend that said agreements, set forth below, be adopted by the New Hampshire

Public Utilities Commission ("Commission") as conditions to or findings in a commission order approving the Rate Agreement in the above-captioned docket.

B. Stipulations

1. In the event that NUSCO acquires PSNH, and for so long as payments made by PSNH under the Unit Contract ("Seabrook Power Contract") to North Atlantic Energy Corporation are recovered from ratepayers through an adjustment clause in a manner substantially identical to the recovery of such payments allowed under the Fuel and Purchased Power Adjustment Clause ("FPPAC") (and except for the \$700 million cost established for Seabrook as of the effective date of PSNH's reorganization and the additional costs, if any, relating to Seabrook, up to \$200 million incurred prior to December 31, 1992 in placing Seabrook in commercial

operation, as to which costs this waiver provision shall not apply) the recovery through retail rates of any and all such payments made by PSNH under the Seabrook Power Contract will continue to be subject to prudence review by the NHPUC. For such period of continued FPPAC existence or similar treatment of PSNH's Seabrook Power Contract payments, PSNH and NAEC severally and jointly waive or will waive any provision of law that would preclude NHPUC prudency review of the recovery through retail rates of such Seabrook Power Contract payments by PSNH. Between the First Effective Date and ten years following the First Effective Date, a prudent expense shall, for the purpose of this provision, mean an expense that a reasonable utility management would have made, in good faith, under the same circumstances, and at the time the expense was actually incurred or at the

time the utility became committed to incur the expense. Such definition shall apply after ten years following the First Effective Date for so long as the waiver described in this paragraph continues in effect, or until NUSCO and the Commission adopt a different definition by mutual agreement.

2. NUSCO shall provide a legal opinion (to be furnished not later than the filing of its brief) that the no-setoff language of the Seabrook Power Contract would not foreclose any cause of action that PSNH otherwise would have against NAEC.

3. Interest shall accrue and be applied to the average of the beginning monthly balance and ending monthly balance of any over-recovery or under recovery of FPPAC costs at an interest rate equal to the average prime rate, as reported in the Wall Street Journal, for

that month. Commencing in 1991, the amount of any FPPAC credit or charge shall be subject to interim changes during the six-month FPPAC period at times and upon events substantially similar to the times and events applicable to interim changes under ECRM.

4. The FPPAC should be interpreted in accordance with the intent of the parties negotiating the Rate Agreement so that the term "actual prudent energy and purchased power costs" as used in the first paragraph of Exhibit C to the Rate Agreement (Exhibit NU-1E, page D-91) would be deemed not to include: (i) the cost of any purchase of capacity, including capacity exchanges, made in order to replace that portion of any PSNH capacity sold that causes PSNH to be unable to meet its allocated capability responsibility; or (ii) the incremental cost of energy required to replace energy

from resources sold pursuant to capacity sales contracts entered into after the First Effective Date.

5. A drafting error in the formula for "PA" appearing on page D-104 of Exhibit NU-1E is hereby acknowledged and the formula should read as follows:

$$PA = \frac{(FPPACa - FPPACp) \times SAa}{SAf}$$

6. (i). To the extent that Section 5(v) (A) of the Rate Agreement, Exhibit NU-1E, page D-13, allows recovery for the cost of compliance with environmental orders, regulations, and laws, said Section 5(v) (A) should be interpreted to apply only to such costs incurred in connection with PSNH's non-production facilities. All such costs incurred by PSNH for production facilities shall be recovered through FPPAC, pursuant to the definition of the term "EA" on pages D-91 and 92 of Exhibit NU-1E.

(ii). With respect to the concern of the NHPUC Staff that PSNH should implement least-cost measures without a NHPUC mandate, the parties acknowledge that the intent of the Rate Agreement is that neither PSNH nor ratepayers should assume risks or costs (beyond the requirements of Section 5(v) of the Rate Agreement) from any determination made by PSNH as to whether or not to pursue such measures. Toward that end, and consistent with the parties' desire not to exceed the projected rate path, the parties agree to cooperate in achieving their mutual goal by recommending, as needed, innovative mechanisms to permit rate stability and implementation of least--cost measures without adversely affecting the financial assumptions upon which the Undersigned Parties relied in agreeing to the 5.5 percent rate path. Such innovative mechanisms could include

retention by PSNH of any fuel expense savings until the capital costs incurred by PSNH for such measure are repaid, if such savings result from any least-cost measure that (a) does not meet the criteria of Section 5(V) of the Rate Agreement, and (b) is not included in base rates assumptions.

7. (i) If the Commission orders PSNH to implement any conservation and load management ("C&LM") programs in excess of the base level included in the current projections for the Rate Agreement, PSNH shall be entitled to recover fully the sum of any and all incremental direct program costs (including but not limited to equipment and installation costs, administration and planning costs, load research costs and monitoring and evaluation costs). In addition, PSNH shall be entitled to recover fully all other costs (including

lost fixed costs) and incentives related to C&LM programs only as may be permitted either in this or any other Commission proceeding.

(II) For the purposes of this paragraph 7, the base level for C&LM programs included in the current base rate projections for the Rate Agreement means programs approved by the Commission totalling approximately \$1.167 million in annual 1989 costs to PSNH; provided that Rate WI and other interruptible program costs shall be recovered as Purchased Capacity Expense under FPPAC.

(iii) All incremental C&LM costs which PSNH is entitled to recover pursuant to this paragraph shall be recovered under Paragraph 5(v)(D) of the Rate Agreement, and any incremental level of C&LM expenditures allowed by the Commission to be recovered under Paragraph 5(v)(D) in one year shall be increased by 5.5%

annually for the remainder of the fixed rate period. The intent of the preceding sentence is that compounding of the 5.5% increases in allowed C&LM costs will be matched by corresponding increases in C&LM expenditures and will not be retained by PSNH as income.

(iv) The NHPUC Staff shall use its best efforts to facilitate the issuance of a report and order of the Commission in Docket DR 89-187 on or before the issuance of a report and order this docket.

8. PSNH shall file semi-annual reports indicating actions taken to achieve the cost savings represented by NUSCO as part of the benefits of NU'S acquisition of PSNH.

Within 30 days of the First Effective Date, NUSCO and PSNH will consult with the Chief Engineer of the NHPUC, or a designee, as to the

development of performance measures and statistics for tracking distribution system reliability and customer outages.

10. Section 3(d) of the Rate Agreement (Exhibit NU-1E, page D-10) should be interpreted consistent with the intent of the parties negotiating the Rate Agreement that the 20-year load and resource plan filed by NUSCO provides adequate assurances that NUSCO will have available sufficient supply side options at reasonable cost to meet the energy needs of New Hampshire for 20 years. Further, the Commission's acceptance of the 20-year load and resource plan shall not relieve NUSCO from its obligation to implement least cost planning as specified by the Commission or limit, in any way, the right of the Commission to set just and reasonable rates.

C. PROCEDURAL UNDERSTANDINGS

The Undersigned Parties jointly

recommend that the Commission adopt the recommendations set forth in Paragraph 1 through 10, above, as conditions to, or findings in, any order of the Commission approving the Rate Agreement as being consistent with the public good. Finally, the Undersigned Parties jointly recommend that no additional substantive conditions be imposed by the Commission that conflict with express language in the Rate Agreement or that alter allocations of risk or revenue expectations under that agreement.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

John P. Arnold
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STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Petition of Northeast Utilities)

Service Company)

Re Public Service Company of) Docket No

New Hampshire Reorganization) DR 89-244

SECOND JOINT RECOMMENDATION
TO THE COMMISSION

The State of New Hampshire, by and through its attorneys ("State"), and Northeast Utilities Service Company ("NUSCO") have reached agreement regarding the appropriate calculation of the Fuel and Purchased Power Adjustment Clause ("FPPAC") in view of the revisions in the data underlying base assumptions attributable to Seabrook. In summary, the State and NUSCO agree that a change should be made to the "BA" component of FPPAC. Such a change would use the savings experienced in future years to offset the near-term impact on rates of

an increase in base assumptions. With this change, the State and NUSCO believe the integrity of the rate path established by the Rate Agreement⁴ will be preserved.

Introduction

As part of rebuttal testimony, NUSCO provided revised projections for Seabrook Operating and Maintenance ("Seabrook O&M) and nuclear fuel for the fixed rate period of the Rate Agreement which is the subject of this docket. NUSCO's revisions would increase the projected cost of Seabrook O&M and decrease the cost of nuclear fuel.

The State had NUSCO's nuclear fuel projections reviewed by a nuclear fuel expert employed by Ernst & Young. This

⁴The Rate Agreement was signed by NU and the State on November 22, 1989 and is the subject of this docket. Hereinafter, the Agreement, including exhibits and schedules, will be referred to as "the Rate Agreement".

review included a comparison of NUSCO'S original and the revised projections. Also, the review examined the assumptions and principals employed by NUSCO to compute the lower projected fuel cost including the assumptions relative to AFDUC.

Based on the information provided by NUSCO, the State finds the revised projections for nuclear fuel to be reasonable.

The State did not independently analyze the revised projected Seabrook O&M Expenses. However, the State agrees that the annual Seabrook O&M expenses will be greater than the original projection of NUSCO (\$95 million), but less than the amount projected by the present operators of Seabrook (\$154 million). Based on the record developed in this docket, the State believes it is reasonable to use NUSCO's revised

projection of the annual Seabrook O&M expenses (\$113 million) in the calculation of the "BA" component of FPPAC.

Recommendations

The State and NUSCO recommend that the commission incorporate the following adjustments.

1. The base assumption for the Seabrook O&M expense should be increased to \$113 million for 1991 and escalated at 5.5% per year thereafter. The Seabrook O&M expense for 1991 includes an estimated severance expense item of \$5.1 million.

2. The base assumption for nuclear fuel expense should be reduced to reflect the revised projections, discussed at the hearing, to the extent necessary to offset the increases to the Seabrook O&M expense described in Paragraph 1 on a net present value basis.

3. The base assumption for the capacity factor for Seabrook, and all other base assumptions, should remain unchanged.

4. Fuel and purchased power BA as set forth in Exhibit C, Schedule 1 should be adjusted as set forth in Attachment 1 to this joint recommendation to reflect Paragraphs 1 and 2, above.

5. The adjusted BA will result in annual increases in each year of the rate plan of no more than 5.5% if the assumptions relied on are achieved.

6. These adjustments will result in an anticipated cumulative net present value of earnings approximately equal to the cumulative net present value of earnings available to PSNH over the entire seven year period as originally negotiated by NUSCO and the State.

7. This agreement creates additional protection against FPPAC related rate

increases. At the new reference assumptions for Seabrook O&M and nuclear fuel expenses, there would be a net cumulative present value benefit to ratepayers of approximately \$7 million over the fixed rate period.

Conclusion

The State and NUSCO believe that this refinement of the FPPAC calculation is in the public good because it maintains the integrity of the rate path created by the Rate Agreement. In addition, these parties believe that the adoption of these recommendations will reduce the risk to ratepayers that rates will increase during the fixed rate period. For these reasons, the State and NUSCO respectfully request that the Commission adopt these recommendations.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

John P. Arnold

Attorney General

PETER T FOLEY for
Harold T. Judd
Assistant Attorney General
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ATTACHMENT 1
(EXHIBIT C-SCHEDULE 1-REVISED)

ANNUAL BASE RATE LEVEL
OF THE FUEL CHARGE ("BA")
IN THE FUEL AND PURCHASED POWER
ADJUSTMENT CLAUSE ("FPPAC")

Fuel and Purchased Power
"BA"

<u>Year</u> (¢/kwh)	<u>Seabrook</u> <u>Pre-Commercial</u> <u>Operation (¢/kwh)</u>	<u>Seabrook</u> <u>Post-Commercial</u> <u>Operation</u>
1990	3.291	3.447
1991	3.154	3.520
1992	3.263	3.760
1993	3.457	4.096
1994	3.609	4.351
1995	3.985	4.823
1996	4.213	5.054

Note: This base rate level of fuel and purchased power assumes an initial capital structure and cost to NEWCO as follows:

	<u>Structure</u>	<u>Cost</u>
Debt	80%	11.5 and 15.0%
Equity	20%	13.75%

At the Second Effective Date the base rate level fuel charges will be updated using the actual NEWCO capital structure and cost and to reflect the results of any renegotiation with the New Hampshire Cooperative, Inc. It is intended that such updates will have no impact on total rates if the reference assumptions, as updated, are achieved.

STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION
8 Old Suncook Road
Concord, N.H. 03301-5185

June 27, 1990

John N. Nassikas, Special Commissioner
Bruce B. Ellsworth, Commissioner
Linda G. Bisson, Commissioner
New Hampshire Public Utilities Commission
8 Old Suncook Road
Concord, New Hampshire 03301

RE: DR 89-244, PSNH Reorganization Proceedings
Joint Recommendation of State and NU for Commission
Order and Second Joint Recommendation to the Commission

Dear Commissioners:

The staff has reviewed the Joint Recommendation for Commission Order and the Second Joint Recommendation to the Commission filed by the Attorney General and NU on June 22, 1990 in the above referenced matter.

Staff concurs with the stipulations presented in both the Joint Recommendation and the Second Joint Recommendation and represents to the commission that said recommendations adequately address the concerns expressed by Staff Witness Rodier in his testimony in this proceeding. The Second Joint Recommendation diminishes the likelihood that rates will increase 5.5% in 1991 by adding an additional seven million dollars to the FPPAC formula. While this does not eliminate all risks to ratepayers that rate increases will be limited to 5.5%, it provides additional assurance that the projection of a 5.5% rate path is reasonable.

Staff does not concur, however, with the last sentence in the "procedural understandings" section on page seven of the Joint Recommendation. Although staff agrees that the record is sufficient to support a finding that the Rate Agreement is consistent with the public good, staff also recognizes that the record reflects risks to ratepayers that the commission may find unacceptable. Accordingly, staff refrains from recommending that no additional substantive conditions be imposed by the commission that conflict with the express language in the Rate Agreement or that alter allocations of risk or revenue expectations under that agreement. Such a determination is purely within commission discretion.

Sincerely

Wynn E. Arnold
Executive Director & Secretary

APPENDIX D

THE STATE OF NEW HAMPSHIRE

BEFORE THE

NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION

Petition of Northeast Utilities
Service Company DR 89-244
Re Public Service Company of
New Hampshire Reorganization

APPLICATION OF MARTIN ROCHMAN,

EDWARD KAUFMAN, AND ROBERT RICHARDS

FOR REHEARING OF ORDER

APPROVING RATE AGREEMENT

We, Martin Rochman, Edward Kaufman
and Robert Richards (hereinafter
sometimes referred to as "RKR") hereby
request pursuant to RSA 541:3 rehearing
and reconsideration of the order issued
by the Commission on July 20, 1990,
pursuant to RSA 362-C approving the Rate
Agreement executed by the State of New
Hampshire (State) and Northeast Utilities
Service Company acting on behalf of its

parent Northeast Utilities (NU) which purports to set rates in the future for PSNH and therefore establish the value of PSNH's assets.

We are record and/or beneficial holders of common stock in PSNH and will be directly effected by the Commission's approval of the Rate Agreement. We contend that approval of the Rate Agreement denies PSNH and its common stockholders their constitutionally protected property rights; and we hereby ask the Commission to reconsider its decision and declare for the reasons set forth herein that it can not approve the Rate Agreement and deny approval. We also ask that if the Commission should grant approval despite the arguments set forth herein that the Commission make approval conditioned on the Confirmation Order of the Bankruptcy Court becoming a final and non appealable order.

I RKR ARE DIRECTLY EFFECTED BY THE
COMMISSION'S ORDER

As a result of the Commission's order approving the Rate Agreement, the Third Amended Joint Plan of Reorganization (the Plan) proposed by NU et al that was confirmed by the Bankruptcy Court on April 20, 1990, will go into effect (if other conditions of effectiveness are met) and the common stock of PSNH will be converted into securities of Reorganized PSNH. Those securities are estimated by the proponents of the Plan to have a value of at most \$3.88 per share and are estimated by the market place to be currently worth about \$3 per share. Such amounts are significantly less than the book value of PSNH's common stock as reflected on its financial accounting books even after the change in accounting for Seabrook and very much less than was reflected on its

regulatory books (its Form 1) prior to confirmation of the Plan. If the Rate Agreement is not approved and the Plan does not become effective, PSNH will have the right to pursue the recovery of Seabrook in the traditional manner and will be entitled to recover a much greater percentage of its investment in Seabrook and will achieve a much greater value for its common stock than the Plan will achieve. Passage of RSA 362-C and approval of the Rate Agreement denied PSNH that right and thus has a direct impact on the value of our property. WE therefore have a right pursuant to RSA 541: 3 to request rehearing for purposes of reconsideration.

II. APPROVAL OF THE RATE AGREEMENT WOULD DENY PSNH AND ITS STOCKHOLDERS THEIR CONSTITUTIONAL RIGHTS AND THEREFORE IS INCONSISTENT WITH THE PUBLIC GOOD.

A. Approval of the Rate Agreement

Would Result in the Taking of PSNH'S
Property Without Compensation

Approval of the Rate Agreement would result in the taking of PSNH's property and therefore the property of its stockholders without compensation and thus in violation of the fifth and fourteenth amendments to the U.S. Constitution and part I, article 12 of the New Hampshire Constitution.

As the Supreme Court of N.H. has said PSNH is entitled to charge rates that are just and reasonable and that "fall within the zone of reasonableness between confiscation of utility property or investment interests and ratepayer exploitation" and a just and reasonable rate is one which reflects, among other things, a rate of return "commensurate with returns on investment in other enterprises having corresponding risks."

Petition of Public Service Company of NH,

130 N.H. 265 (1988). The Supreme Court of N.H. held that the State's anti-CWIP law is constitutional but it did not hold that New Hampshire can deny PSNH the right to recover its investment in its operating plant. And it specifically said that if Seabrook becomes operational and therefore is a success PSNH will be entitled to recover its investment plus a return that compensates PSNH and its investors for the risk that the anti-CWIP law forced them to run. Seabrook is now operational and therefore PSNH is now entitled under the Constitution of the U.S. to recover its investment and a reasonable return on that investment.

Commission approval of the Rate Agreement pursuant to RSA 362-C would deny PSNH that right. The Commission's decision makes it clear that the Rate Agreement will not enable Reorganized PSNH to recover its prudent investment in

Seabrook. Indeed, the decision makes it clear that the rates are not even sufficient to enable Reorganized PSNH to recover the book value of Reorganized PSNH's assets. Those assets will be carried at an initial value of \$2.3 billion but the rates will not enable Reorganized PSNH to recover the cost of capital on that mount less accrued depreciation for several years. In other words, the investors and in particular the common stockholders in PSNH will not even get what the proponents of the plan of reorganization claim they will be getting. And of course \$2.3 billion is, according to all audits that have been done on Seabrook, far less than the prudent cost less accrued depreciation of all of PSNH's assets. As the Commission reported to the Supreme Court of N.H. when transferring the question of whether the anti-CWIP law was constitutional as

applied to PSNH in docket number DR 87-151, the audits done by the owners and by the Commission indicate that at least 93% of the Seabrook investment was prudently incurred. That would imply that PSNH has at least \$3.7 billion of prudently incurred assets used and useful in the public service. And there is no evidence in this record that challenges those audits. There is some self serving testimony that the Rate Agreement is fair and was within the range of reasonable outcomes but no evidence that only \$1.5 billion of Seabrook was prudently incurred and therefore no support for the Commission's determination that the Rate Agreement was in fact within the range of reasonable outcomes. Indeed, as Staff's witness Sullivan acknowledged a prudency review could result in a recovery of as much as \$2.9 billion of Seabrook. In sum, there

is no evidence that would support a determination that the Rate Agreement was consistent with PSNH's constitutional right to recover its prudent investment in used and useful plant.

B. Approval of the Rate Agreement
Would Retrospectively Change the
Standards Applicable to Setting Rates for
PSNH

Even if approval pursuant to RSA 362-C were not unconstitutional because of its impact on PSNH and investor interests, it would nevertheless be unconstitutional because it effectively retrospectively changes the standard of just and reasonable rates for PSNH.

Prior to the passage of RSA 362-C, PSNH had a right to charge rates that were determined to be just and reasonable by the Commission and that were "sufficient to yield not less than a reasonable return on the cost of the

property of the utility used and useful in the public service less accrued depreciation, as shown on the reports of the utility filed with the commission, unless there appears to be reasonable ground for questioning the figures in such reports." RSA 378:27, 28. RSA 362-C purports to change the law applicable to PSNH. It authorizes the Commission to approve the Rate Agreement if it determines that the implementation of the agreement is consistent with the public good, "notwithstanding any other provision of law". It thus purports to authorize the Commission to ignore "cost of property less accrued depreciation" as a standard for setting just and reasonable rates for PSNH. The legislature, however, can not change the test of just and reasonable rates after the fact.

As the Supreme Court of N.H. has

said, PSNH has a vested right to "just and reasonable rates based in part upon property used and useful in the generation of electricity." Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 280. Approval of the Rate Agreement pursuant to RSA 362-C, would deprive PSNH and its investors of that right and since it would do so after investors have entrusted their money to PSNH, it would do so retrospectively and contrary to part I, article 23 of the New Hampshire Constitution and Section 10 of Article I of the U.S. Constitution.

C. Approval of the Rate Agreement Would Deprive Investors in PSNH of Equal Protection of the Laws.

Even if approval of the Rate Agreement pursuant to RSA 362-C is otherwise constitutional, it would fail to pass constitutional muster because it would effectively deprive investors in

PSNH of equal protection of the laws in violation of the fourteenth amendment to the U.S. Constitution. Whereas other utilities in the state are entitled to charge rates that recover the cost of prudent investments less accrued depreciation used and useful in the public service, approval of the Rate Agreement would imply that PSNH is not entitled to recover the cost of its investments if the Commission determines that that is consistent with the "public good". Clearly, the standard applicable to setting rates for PSNH would be different from the standard applicable to all other utilities in the state.

It is claimed that the fact that PSNH is in bankruptcy justifies special treatment by the State. To some extent that is true. Since the State has an interest in keeping its utilities out of bankruptcy or getting them out as soon as

possible, the fact that PSNH is in bankruptcy would justify giving PSNH special treatment that might not be available to other utilities. It would have for instance justified allowing PSNH to put some of Seabrook in rate base prior to completion as PSNH requested back in 1987. And it would justify doing that now. But it is irrational and arbitrary and capricious to say that it justifies depriving PSNH and its investors of rights available to other utilities and other investors. Kicking somebody when he is down is not normally considered fair play.

The Commission is authorized by RSA 362-C to approve the Rate Agreement if it is consistent with the public good, but it is not obliged to do so. Since approval will clearly result in deny the stockholders their constitutional rights, the Commission should and indeed must

declare that approval is not consistent with the public good and deny approval.

III. THE COMMISSION HAS NO AUTHORITY TO APPROVE THE RATE AGREEMENT BECAUSE RSA 362-C IS UNCONSTITUTIONAL PER SE

Not only will approval of the Rate Agreement in this case result in the denial of PSNH and its investors' constitutional rights, but RSA 362-C necessarily denies them of those rights and, therefore, is unconstitutional per se.

RSA 362-C not only authorizes the Commission to approve the Rate Agreement but effectively prohibits it from approving any more costly rates for PSNH. PSNH can not be reorganized unless the Commission approves rates while PSNH is in bankruptcy and RSA 362-C:5 prohibits it from approving any more costly rates while it is in bankruptcy. Therefore, RSA 362-C effectively deprives PSNH of

the option to seek rate relief in the traditional manner and effectively deprives PSNH of the right to have its rates and the value of its assets determined by the application of existing standards. It, therefore, necessarily results in the taking of PSNH's property without compensation, constitutes a retrospective change in the law applicable to PSNH and its investors and denies PSNH and its investors equal protection of the laws.

The Commission therefore has no authority to approve the Rate Agreement and it must deny approval.

IV APPROVAL MUST BE CONDITIONED ON THE CONFIRMATION ORDER BECOMING A FINAL ORDER.

If the Commission approves the Rate Agreement it should condition it on the Confirmation Order becoming a final order. We are appealing the Confirmation

Order and, notwithstanding the Commission's approval of the Rate Agreement, we may be successful in reversing the order on the grounds that it is not a fair compromise of a traditional rate case. In that event the Commission's approval of the Rate Agreement should be considered null and void for the following reasons:

RSA 362-C:5 contemplates that the Rate Agreement will be approved only if embodied in the NU Plan or some other plan of reorganization. It does not contemplate that the Commission has the authority to approve it in the absence of a plan of reorganization.

There would also then be no support for the determination that the Rate Agreement is a reasonable compromise of a rate case. The Bankruptcy Court's determination to that effect will have been reversed and there is no evidence in

this record except quotes or a rehash of evidence submitted before the Bankruptcy Court, that would support such a determination.

Under such circumstances, it would clearly be arbitrary and capricious and an abuse of discretion for the Commission to not make approval conditional on the Confirmation Order becoming a final order.

V. CONCLUSION

Wherefore, we respectfully request that the Commission upon rehearing and reconsideration deny approval of the Rate Agreement on the grounds that (1) approval would deny PSNH and its investors their constitutional rights and therefore is inconsistent with the public good; and (2) that RSA 362-C is unconstitutional per se, and therefore it has no authority to grant approval; and we further request that the Commission

make approval specifically conditioned on the Confirmation Order becoming a final order.

DATED: August 7, 1990

Respectfully submitted

[RKR]

APPENDIX E

DR 89-244

NORTHEAST UTILITIES/
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
COMMISSION REPORT AND ORDER
DENYING APPLICATION OF
MARTIN ROCHMAN, EDWARD KAUFMAN, AND
ROBERT RICHARDS
FOR REHEARING OF ORDER APPROVING
RATE AGREEMENT
REPORT

On August 8, 1970, Messrs. Rochman, Kaufman and Richards (RKR), record or beneficial stockholders of PSNH filed an application for rehearing of Commission Report and Order No. 19,889 (final Order) approving the Rate Agreement between the state of New Hampshire and Northeast Utilities (Rate Agreement) relating to the reorganization of Public Service

Company of New Hampshire (PSNH). Rkr's application for rehearing alleges that approval of the Rate Agreement denies PSNH and its common stockholders their constitutionally protected property rights and that RSA Chapter 362-C is unconstitutional. RKR states in the alternative that the Commission should condition its Final Order upon the United States Bankruptcy Court's confirmation order becoming final and nonappealable.

RKR were not parties to this proceeding. The commission denied RKR's petition to intervene in order nos. 19,814, May 7, 1990, and 18,831, May 17, 1990. The commission also denied Richards' motion for reconsideration of denial of his intervention in this proceeding, order no. 19,830, May 17, 1990. RKR'S current application for rehearing under RSA 541:3 does not show that either the commission proceeding or

the commission's Final Order "directly affected" their interests. Nor does the application for rehearing assert any "good reason" to grant a rehearing as required by RSA 541:3.

As PSNH stockholders, RKR'S rights are derivative of PSNH's rights. PSNH was a full party to these proceedings, supported the Rate Agreement and did not request reconsideration of order no. 19,889. Also, since RKR's rights have already been adjudicated by the Bankruptcy Court, RKR have suffered no "injury in fact" by the commission's Final Order; since RKR's rights are derivative, RKR are not "directly affected" by the NHPUC proceedings. The gravamen of RKR's claim of injury is the alleged diminution in the value of PSNH's corporate assets resulting from the Rate Plan compared to a theoretical PSNH rate case valuing Seabrook and total assets at

a higher level. However, the assertion of diminution in value of corporate assets is not direct harm granting a shareholder the right to sue in his own right. The exception to the general rule, not here alleged, is that the interests of the complaining stockholders are distinct from the interests of other shareholders.

RKR's claim of lost value is unwarranted, resting on the fragile ground, not supported by credible evidence, that PSNH would receive higher rates in a contested rate proceeding than under the Rate Agreement. The Bankruptcy Court rejected this claim in finding the rates under the Rate Agreement represent "a fair and equitable settlement and compromise well within the range of results reasonably expected in a litigated rate case." Our analysis confirmed the Bankruptcy Court's finding.

Report at 58; see also Report at 59-63.

The rights of RKR as PSNH stockholders are determined by the Bankruptcy Court's confirmation order, which refers the Rate Agreement for implementation to the commission. RKR's interests result from the Court's resolution of the bankruptcy, not from NHPUC's implementation of the confirmed Joint Plan under RSA 362-C.

RKR have sought to protect their rights by appeal of the Bankruptcy Courts's confirmation of the Rate Plan to the United States District Court for the District of New Hampshire. 28 U.S.C. Secs. 157, 158. RKR do not have the right to seek an ancillary remedy in the N.H. Supreme Court. RKR do not have standing in the New Hampshire State forum to claim injury by the Rate Agreement and the commission's Final Order and therefore have no standing to complain that their

constitutional rights have been violated by the commission's order or that RSA Chapter 362-C is unconstitutional.

It is the commission's opinion that RKR's application should also be denied because it does not offer "good reason" for rehearing. RKR's application for rehearing merely restates the issues and arguments in previous filings and presents no new evidence or issues. See petition to intervene of Robert C. Richards dated April 23, 1990 and supplement to petition to intervene of Robert C. Richards dated April 25, 1990, denied by order no. 19,814 May 7, 1990; petition to intervene of Edward Kaufman dated May 3, 1990 and petition to intervene of Martin Rochman dated May 4, 1990, denied by order no. 19,831 May 17, 1990 and motion for reconsideration of denial of intervention of Robert C. Richards dated May 9, 1990; denied by

order no. 19,830 May 17, 1990.

RKR claims that approval of the Rate Agreement violated RKR's constitutional rights by retrospectively changing ratemaking standards for PSNH, depriving RKR of property rights without compensation, and denying PSNH investors of their right to equal protection under the law. The commission has concluded that the Rate Agreement has not caused the alleged constitutional injuries either to PSNH or RKR.

There are no respective changes since there has been no impairment of a vested legal right. Neither investors nor PSNH had a vested right to have rates set pursuant to RSA 378:27, :28. PSNH joined with NU and the state in supporting the Rate Agreement, and suspended its own reorganization plan before the Bankruptcy Court. PSNH does not claim any violation of its constitutional rights. RKR have no

standing to so assert.

As to RKR's claim of a vested right to just and reasonable rates by traditional ratemaking under RSA 378:27, :28, RSA 362-C establishes an appropriate modus operandi for just and reasonable rates not restricted by the methodology prescribed in RSA 378:27, :28. See Report at 48-49 and 139-141. The rate methodology under the Rate Agreement was just and reasonable. Report at 40-58; See also commission findings and approval, Report at 181-189, Approvals 1 and 2 at 181. There is no vested right to have just and reasonable rates determined by RSA 378:27, :28, although the commission applied traditional rate making analysis under RSA 378:27, :28 to the extent feasible.

We reject RKR's argument that the Rate Agreement retrospectively changes rate making standards applicable to PSNH.

Secondly, there is no merit to RKR's claim that approval of the Rate Agreement will deny PSNH its right to recover a reasonable return on its investment in PSNH and violates the constitutional prohibition against taking property for public use without just compensation. Amendments V and XIV, of the U.S. Constitution and Article 12 of the New Hampshire Constitution.

The Bankruptcy Court held and the commission confirmed that the Rate Agreement produces a result that is within the range reasonably to be expected in a litigated rate case and the Rate Agreement does not produce a lesser value than the estimated value resulting from litigation. See Final Order at 58. In this circumstance, there can be no taking. While RKR offered no proof that there will be a diminution in value, whatever conjectural lower value would

result from the Rate Plan compared to a litigate rate case is attributable to the Bankruptcy Court's adjudication and PSNH's election to use RSA 362-C to determine just and reasonable rates by implementing the Bankruptcy Court's confirmation of the reorganization plan. Therefore, the commission's Final Order did not impair the value of RKR's investment.

Third, the Rate Agreement does not deprive RKR of their equal protection rights to recover their investment under the same standards governing protection of investor rights in other utilities. The standard of RSA 362-C is consistent with legislative findings that the PSNH bankruptcy should be expeditious resolved and that reliable electric service at reasonable, stable rates is essential to serve the public interest. The seven year fixed rate schedule would have been

impossible of attainment under traditional ratemaking principles.

RKR also argues that RSA 362-C is unconstitutional per se, because the statute denies PSNH and its investors of the right to higher rates. We recognize that the commission is not empowered to determine the constitutionality of RSA 362-C. We may nevertheless express our view that the statute should be upheld if the constitutional issue reaches the N.H. Supreme Court for its definitive ruling. The statute clearly serves the express governmental purposes of RSA 362-C:1. RSA 362-C:3 authorizes the NHPUC to determine whether implementation of the Agreement and prescribed just and reasonable rates will serve the public good. The statute does not proscribe PSNH from seeking approval of rates higher than those set in the Rate Agreement, e.g. RSA 378:27, :28, although as a

practical matter or even as a matter of law, PSNH's joinder in NU's reorganization plan precluded proceedings by PSNH for an alternative rate setting plan.

RSA 362-C authorized the commission to implement the Rate Plan if the plan served the public good. Based on comprehensive analysis of public policy considerations and record evidence, the commission found that the plan served the public good. The commission was free to reject the plan if it did not serve the public good, whether or not an alternative reorganization plan to resolve the PSNH bankruptcy had been offered in evidence. The commission analysis of possible alternatives by traditional ratemaking concluded that the rates under the Rate Plan better served the public good than the alternatives. See Final Order at 49-55.

Even if there was a flat prohibition .
against any other rate plan pending NHPUC
review of the plan confirmed by the
Bankruptcy Court, PSNH would not be
restrained from submitting an alternative
higher priced plan through the bankruptcy
process if the Rate Plan had been
rejected. In our opinion RSA 362-C is
constitutional and RKR's claim of
unconstitutionality as a ground for
rehearing is dismissed.

Finally, RKR argues, that the
commission should condition the
effectiveness of its Final Order upon the
confirmation order of the Bankruptcy
Court becoming final and nonappealable.
If this condition were imposed, there
would be interminable delay before the
final appellate adjudication of the
confirmation order was consummated.
Indefinite delay in implementing the
commission's Final Order would result.

PSNH status in limbo would not serve the public good.

RKR's motion for stay was denied by the Bankruptcy Court on June 19, 1990 on the ground that \$1.5 billion of financing would be jeopardized, and the public interest in insuring predictable rates for N.H. ratepayers would be defeated. On appeal to the U.S. District Court for the District of New Hampshire, a stay was requested and denied.

We will deny RKR's request to impose a condition to stay our Final Order until the appeal process for the confirmation order has been exhausted. Such conditions will not serve the public good.

Our order will issue accordingly.

Concurring: August 17, 1990

JOHN N. NASSIKAS
Special Commissioner
Presiding

BRUCE B. ELLSWORTH
Commissioner

LINDA G. BISSON
Commissioner

DR 89-244

NORTHEAST UTILITIES/

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

ORDER NO. 19,918

Based on the foregoing report, which is made a part hereof, it is hereby

ORDERED, that the Application of Martin Rochman, Edward Kaufman and Robert Richards for Rehearing of Order Approving Rate Agreement on August 8, 1990, is denied.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of August, 1990.

<u>JOHN N. NASSIKAS</u>	<u>BRUCE B. ELLSWORTH</u>
John N. Nassikas	Bruce B. Ellsworth
Special Commissioner	Commissioner
Presiding	

LINDA G. BISSON
Linda G. Bisson
Commissioner

Attested by :

WYNN E. ARNOLD
Wynn E. Arnold
Executive Director & Secretary

APPENDIX F

DR 89-244

NORTHEAST UTILITIES/
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
COMMISSION REPORT AND ORDER DENYING
MOTION FOR REHEARING ON BEHALF OF
JOHN V. HILBERG AND
CAMPAIGN FOR RATEPAYERS RIGHTS
REPORT

On August 9, 1990, John V. Hilberg and the Campaign for Ratepayers Rights (movants or petitioners) move for Rehearing of the commission's report in DR 89-244 of July 20, 1989, and order no 19,889 of the same date.

John V. Hilberg (Hilberg) was admitted as an intervenor and is a party within the meaning of RSA 541:3. Campaign for Ratepayers Rights (CRR) is admittedly not a party, simply filing a statement of position on May 29, 1990, not part of the record evidence in this proceeding. CRR

claims standing, as a "person directly affected" by the commission's report and order of July 20, 1990, to "...apply for rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order...."

CRR did not demonstrate that its interests have been "directly affected" by the Commission's Order. As a party in interest, Hilberg is not required to show that his interests were "directly affected" as a precondition to consideration of his motion for rehearing. However, Hilberg did not demonstrate "good reason" for granting his motion, as outlined, infra.

CRR claims "standing" based on its alleged status as a statewide organization "concerned about the impact of electric rates". Motion at 2. CRR makes no claim in its complaint that CRR has suffered an injury in fact required

as a precondition to "standing" for appeal. New Hampshire Banker's Association v. Nelson, 113 N.H. 127, 128-129 (1973). CRR has simply alleged interest in the impact of the rates prescribed in the order, without showing that it has been adversely affected or aggrieved by the order. "Special interest" is not enough to gain standing for appeal. Sierra Club v. Morton, 405 N.H. 727, 734-735 (1972) (denying Sierra Club standing to sue under the Administration Procedure Act where no personal injury in fact was alleged).

CRR's post-hearing and post-final order attempt to secure appellate standing should be denied on the further ground that CRR did not actively participate in the hearings although CRR's representative was present at the hearings and declined an invitation to participate. CRR's failure to offer

evidence at the hearings to support claims now made for the first time should disqualify CRR from standing to appeal. For these reasons CRR's motion should be denied. However, we address infra, substantive issues purporting to be raised by CRR's and Hilberg's joint motion and will deny the motion on the merits for the reasons set forth in our report herein.

While Hilberg participated in the hearings by cross-examining witnesses and filing a brief, he did not offer any evidence to support the argument and claims made for the first time in his motion.

CRR and Hilberg's joint motion fails to show good cause to grant rehearing of issues which should have been presented at the hearing. It is the commission's opinion that no "good reason" for rehearing has been presented in the

motion. Accordingly, for this reason and the reasons cited above the motion should be denied.

The motion asserts four grounds for rehearing:

1. The findings of the Commission are not supported by a preponderance of the evidence;

2. The Order is without jurisdiction of the commission in that it violates RSA 378:7, :27 and :28;

3. The Order fails to balance the interests of consumers and investors, and sets unjust and unreasonable rates in violation of the state and federal constitutions. N.H. CONST. pt. 1. art. 15; U.S. CONST. amend. V. and XIV;

4. The manner in which the rates set forth in the Rate Plan were determined violates the state and federal constitutions. N.H. CONST., pt 1, art. 15; U.S.CONST. amend. V and XIV.

Except for Ground 1 above, movants assert for the first time in Grounds 2, 3 and 4 matters not presented for determination by the commission in this proceeding or included in its order. With reference to Ground 3, Hilberg did not argue or raise the issue of violation of RSA 378:7, 27 and 28. Nor did Hilberg argue that the commission set unjust and unreasonable rates in violation of the state and federal constitutions (Ground 3), or claim that the manner in which the rates set forth in the Rate Plan were determined violates the state and federal constitutions (Ground 4). Grounds 3 and 4 are due process arguments claiming violation of N.H. constitution of Pt. 1, Art. 15 and U.S. Const. Amend. V and XIV. Since these due process arguments were neither presented during the hearing or addressed in the commission order, the due process arguments were improperly

included in the motion for rehearing and not appropriate issues to be raised on Appeal. Appeal of Campaign for Ratepayers Rights, (New Hampshire Nuclear Decommissioning Finance Committee) N.H. Supreme Court Slip Opinion, August 1, 1990.

Apart from the constitutional argument, which was improperly raised as a ground for rehearing, Ground 3 also asserts that the "...order fails to balance the interests of consumers and investors, and sets unjust and unreasonable rates...."

On rehearing, we affirm our order prescribing just and reasonable rates based on a preponderance of the evidence within the jurisdiction of the commission mandated by RSA Chapter 362-c (HB1-FN adopted December 18, 1989).

RSA 362-C:1 outlines legislative findings that:

I. The health, safety and welfare of the people of the state of New Hampshire and orderly growth of the state's economy require that there be a sound system for the furnishing of electric service.

II. The bankruptcy of the state's largest electric utility, Public Service Company of New Hampshire, has threatened the adequacy, reliability and cost of electric service.

III. The present and predicted growth in electric service demands in the state of New Hampshire requires a prompt resolution of the bankruptcy and reorganization of Public Service Company of New Hampshire.

IV For the reasons stated in paragraphs I-III, the public utilities commission should be authorized to determine whether a proposed agreement relating to the reorganization of Public Service Company of New Hampshire and, upon receipt of required regulatory approvals, the acquisition of Public Service Company of New Hampshire by Northeast Utilities, would be consistent with the public good and whether the rates for electric service to be established in connection with the reorganization are just and reasonable and should be approved.

As directed by RSA 362-C:3 the commission has determined that the implementation of the agreement between the state of New Hampshire and Northeast

Utilities (RSA 362-C:2 I) for the acquisition of PSNH by NU will be consistent with the public good and notwithstanding any other provision of law has established and placed in effect the level of rates and the Fuel and Purchased Power Adjustment Clause as maintained for Public Service Company of New Hampshire, or its successor, in accordance with the Agreement. The commission has determined that the rates are just and reasonable and its report and order should be approved on appeal.

The commission's findings and conclusion that the rates prescribed by the State/NU Rate Plan were reasonable were fully documented and disclosed by a rational process. Report at pp. 40-62.

The movants' argument that the commission did not establish rate base value for PSNH by a rational process is predicated on the erroneous assumption

that RSA 378 controls the determination of just and reasonable rates in this proceeding. The Rate Plan precludes traditional analysis of each component. RSA 362-C does not contemplate the review of just and reasonable rates on the basis of RSA 378:27 and 28 and specifically excludes such constraint in the qualifying phrase "notwithstanding any other provision of law."

The commission order clearly pointed out and articulated the reasons why the determination of the level of just and reasonable rates by traditional ratemaking methodology, is precluded by the Rate Agreement's prescribing the level of retail rates over the seven year fixed rate period. Report at 48. The report analyzed each element of the formula used under traditional ratemaking methodology ($R = O + (B \times R)$) to determine whether the ultimate rates are

just and reasonable. While the commission could not derive a precise rate by applying the traditional formula, the commission could and did test the reasonableness of the prescribed rates by applying traditional rate analysis to each component of the rate paradigm, concluding that the Rate Plan equitably balances the interests of investors and consumers.

The rate base is the investment of \$2.3 billion by NU required by the negotiated settlement of PSNH's bankruptcy case. The rate base was not "backed out" of a level of revenues, as asserted by Hilberg. The investment rate base of \$2.3 billion consisted of \$800 million non-Seabrook assets, \$700 million of Seabrook Assets, and an acquisition premium of \$800 million. The Acquisition Premium of \$800 million is the difference between the acquisition price of \$2.3

billion and the total of Seabrook assets of \$700 million and non-Seabrook assets of \$800 million. The Acquisition Premium is not a payment for PSNH assets in excess of net book value and therefore is not an acquisition premium as the term is normally defined in traditional regulation. Report at 64. The Acquisition Premium is a regulatory asset in PSNH's rate base paid for by NU as part of the acquisition price for PSNH and enables the utilization of tax benefits and scheduling asset amortization consistent with financial requirements and limits on rate recovery by PSNH. Report at 66. Petitioners allege that the Acquisition Premium appreciates the value of PSNH's assets. In fact, there is no mark-up by rather, the \$2.3 billion paid by NU is a mark-down, less than the depreciated book value of PSNH's assets, which were

recorded at \$3.7 billion on PSNH's regulatory books and \$2.6 billion on its financial books. Nor has the commission changed its investment rate base methodology "to fair value" from "original cost". The \$2.3 billion bankruptcy value and corresponding investment rate base value is less than PSNH's original cost estimates.

Hilberg proposes a "New Hampshire Plan" structured like the NU Rate Plan but containing a regulatory asset of \$250 million representing synergies rather than an Acquisition Premium of \$800 million. By this stratagem, he writes off \$550 million of NU's investment of \$2.3 billion for PSNH to emerge from bankruptcy. In the alternative, he proposes that the value of Seabrook would be recognized as \$700 million plus whatever additional prudent costs that would not result in destructive rates.

No evidentiary foundation was presented for this proposal. Contrary to petitioner's assertion in Supplement to Motion, the commission properly ruled at p. 57 of its report that Mr. Hilberg's New Hampshire Plan is beyond the scope of this proceeding. RSA 362-C:5 authorized the commission to approve and implement an alternative Reorganization Plan, which will resolve the PSNH Bankruptcy case. Mr. Hilberg's plan was not presented to the Bankruptcy Court. Nor is there any evidence that the Plan would affirmatively resolve the bankruptcy case, or could withstand judicial review of the proposed treatment of costs of the Seabrook investment or that without merger with NU the Plan would be workable and serve the public good. The proffer of hypothetical rate plans and the speculative outcome of rate proceedings as standards of just and reasonable rates

against which to measure the NU Plan is a will-o'-the-wisp.

The commission compared rates under the Rate Agreement, with foreseeable rates under traditional ratemaking and concluded that rates resulting from traditional ratemaking would probably be higher than under the Rate Agreement, stating that "clearly we cannot predict the precise level of rates under traditional ratemaking. Nor is such determination required to determine whether the Rate Plan serves the public good with just and reasonable rates over the fixed rate period." Report at 51.

Under traditional ratemaking, Stand-Alone PSNH could seek \$1.5 billion or more for Seabrook as part of its \$2.3 billion investment (\$2.3 billion minus non-Seabrook assets of \$800 million). Report at 53-55 outlines record evidence, tending to substantiate Seabrook value

between \$1.5 - \$1.8 billion.

Comparisons with traditional ratemaking support the reasonableness of the Rate Plan. Comparing rates under this agreement with rates forecasted for other New England utilities show that the rates under the Rate Plan are competitive with other New England utilities. Report at 55-56.

The Bankruptcy Court confirmed the fairness of the compromise reorganization and concluded that the Rate Agreement represented ... " a fair and equitable settlement well within the range of results reasonably expected in a litigated rate case." Report at 59.

The commission's scoping order stated that we will determine "whether the rates equitably balance investor and consumer interests so that rates will produce a reasonable return to investors without imposing an undue burden on

ratepayers and the economy of the state of New Hampshire." Report at 42. We concluded: "Our analysis and review of substantial evidence in this proceeding confirms the conclusion that the rates are just and reasonable, fairly balancing the interests of investors and ratepayers". We further stated that "the compromise RATE Plan yields the minimum rates necessary to finance the payment of the \$2.3 billion bankruptcy compromise to PSNH creditors and equity holders without unduly burdening ratepayers or the N.H. economy." Report at 43. Hilberg claims that this is an improper standard against which to measure rates under the plan (Motion at 4), ignoring the teachings of Appeal of Conservation Law Foundation, 127 N.H. at 638, "Thus a reasonable rate is the rate resulting from a process that must consider the competing interests of investors and

customers and must determine the appropriate recognition that each deserves." We have observed this mandate throughout our report.

Hilberg further takes issue with a seven year fixed rate period, likening the Rate Plan to a seven year test period rather than the traditional test year adjusted. Fixed stable rates over seven years only marginally over the rate of inflation are a fundamental aspect of the Rate Plan to enable NU to acquire PSNH and resolve the bankruptcy. The commission determined that the proposed financing of the \$2.3 billion buyout supported by the Rate Plan served the public good. Report at 139. The commission's reasoning was consistent with the scope of the commission's responsibility in approving a financial plan as defined by the Supreme Court in Appeal of Conservation Law Foundation of

New England, Inc. 127 N.H. 606, 614
(1986). See Report at 139-141.

The commission summarized the object of the financing as follows:

- o to consummate the Compromise Joint plan confirmed by the Bankruptcy Court,
- o to terminate the bankruptcy proceeding,
- o to enable the acquisition of PSNH by NU,
- o to serve the economy of the State.

Thus, consistent with the N.H. Supreme Court's precept we have determined that the object of the financing was reasonably required for use in discharging NU's and Reorganized PSNH's obligation to provide safe and reliable service.

We have also determined that NU's plans to consummate the Joint Reorganization Plan confirmed by the Bankruptcy Court and implementation of the Joint Plan by the Rate Agreement between the State and NU are economically justified when measured against any "adequate alternatives." No adequate alternative to the NU financing plan and acquisition have been presented either to the Bankruptcy Court or this commission. Nevertheless, based on record evidence we have examined and evaluated the rate structure

under traditional ratemaking for Stand-alone PSNH and under alternative rate plans supra. We have concluded that the rates produced by the Rate Plan represent a fair and equitable compromise within the ambit of results reasonably to be anticipated in a litigated rate case by Stand-alone PSNH. Our evaluation of record evidence relating to the Rate Plan compels the conclusion that the Joint Reorganization Plan and Rate Agreement will serve the public good.

We now address the question of whether the capitalization resulting from NU's plans would be supportable. As demonstrated by our analysis of the rate support for the resulting capital structure of Reorganized PSNH, with and without Seabrook operating, Stand-alone PSNH with and without Seabrook operating, and NAEC with and without Seabrook operating, the resulting capitalization is supportable by reasonable rates.

We further concluded that the resulting capitalization of Reorganized PSNH, with and without Seabrook operating, Stand-alone PSNH with and without Seabrook operating, and NAEC with and without Seabrook operating was supportable by reasonable rates projected under the Rate

Plan. Report at 141-160.

The reasonableness of rates under the Rate Plan was further confirmed by our analysis of the cost of capital and rate of return for Case 1: Reorganized PSNH Seabrook Operates, Case 2: Reorganized PSNH Seabrook Canceled, Case 3: Stand-alone PSNH Seabrook Operates, and Case 4: Stand-alone PSNH Seabrook Canceled. Report at 45-47.

The rate of return over the seven year period in the base Case 1 Seabrook operating) is on average less than the cost of capital, although higher in 1994-1996. Investor interests in securing a rate of return at least equal to the cost of capital are subordinated to assure the workability of the compromise Rate Plan.

Our analysis of rate of return and cost of capital was consistent with traditional ratemaking methodology within the scope of the seven year projection of

operating revenue, expenses and return on projected investment.

Hilberg's claim that increased rates were imposed upon rates determined in Docket No. DR 86-122, (1987) which suffered from "methodological deficiencies: ignored the fact that the return on equity of 15% and the rates were affirmed on appeal. Appeal of Public Service Company of N.H., 130 N.H. 757 (1988). The current proceeding projects cost of equity at 13.25% and an average rate of return of 11.63%. Report at 45 Fn. 4), Additional schedule p. 6 of 8.

Contrary to Hilberg's assertion, the return on equity is supported by the record.

Although the balancing process cannot technically be derived by traditional ratemaking, the commission's analysis of the Rate Plan demonstrated

that the prescribed rates balanced investor and ratepayer interests so that the equity collar would preclude the return on equity from exceeding 13.25% over the fixed rate period on a cumulative net present value basis and could not fall below 8% in 1993, 9% in 1994, 9.75% in 1995 and 10.5% in 1996. Report at 72-75.

Hilberg concludes that the evidence establishes that \$800 million is the book value of non-Seabrook assets and \$700 million is the value of Seabrook for a total PSNH value of \$1.5 billion. \$800 million of investment accounted for by the acquisition premium adjustment would not be allowed. This proposal would of course defeat the bankruptcy settlement and the Compromise Rate Plan and would not be in the public good. The Hilberg/CRR plan would compel PSNH to seek recovery through traditional

ratemaking of a fraction of its total investment and would result in unconstitutional confiscation of its property.

Hilberg outlines further specification of grounds for rehearing at pp. 15-21 of his motion. His argument is predicated on a Seabrook rate base of \$1.5 billion, notwithstanding the commission finding on the basis of record evidence that the Seabrook rate base is \$700 million. Having raised this red herring, he then argues that the commission must then determine that rates resulting from a \$1.5 billion Seabrook investment would cause a "death spiral" by imposing rates higher than the market will bear, unless the commission finds otherwise. The argument is specious. The Federal Energy REgulatory Commission -not this commission - determines the wholesale rate for Seabrook generation

based on the \$700 million rate base for Seabrook. Hilberg argues a speculative value of \$500 million for Seabrook based on a theoretical application of the claimed value of United Illuminating Company's (UI) 17.5% Seabrook share to PSNH's 35.6% share. Motion at 17. His bootstrap evaluation is not supported by the record evidence in this proceeding or by the findings of the Bankruptcy Court, and misrepresents the evidence presented in DE 0=90-076, the UI sale/leaseback of 35-39% of its Seabrook investment.

Hilberg also argues that the commission failed to evaluate a traditional rate case criterion by applying a "used and useful methodology" which would disallow any excess capacity resulting from overpricing Seabrook in the market. The commission found that the rates for Reorganized PSNH with Seabrook operating were just and reasonable. Base

Case 1 Report at 45. We do not believe rates resulting from valuation of Seabrook at \$700 million will be excess to market rates. Even if Seabrook's operation terminates, the Seabrook Unit Power Contract allows recovery from PSNH of all costs incurred for Seabrook. We have found that the Unit Power Contract is reasonable, ensures a fair balance of investor and rate base interests in the event that Seabrook operates or is canceled and results in reasonable charges to PSNH and to PSNH's ratepayers. Report at 111, NU's Requested Finding 1.f granted at 179. While we are of the opinion based on record evidence that Seabrook power will be used at reasonable rates and will be useful for assured capacity, we do not consider that further analysis of this concept will serve any useful purpose in the light of our finding that the public interest is

served by the Seabrook Power Contract.

In response to Ground 4, p. 17 , Motion, the commission did not find that the Rate Plan depends on the institution of rate structure changes; rather the commission found that rate design assumptions incorporated in NU's sales forecast for PSNH do not have much impact as modeled. The commission specifically did not find that "a rate structure change is necessary to support the maintenance of the projected 2.3% annual growth" as asserted by the motion at p. 17. We further noted that no party has argued that the NU sales forecast is unreasonable. Report at 91. The commission's order that PSNH consult with commission staff and propose a sequence for a rate design proceeding by January 1, 1991, did not imply a commission forecast of the result of the hearing requiring legislative approval.

In response to Ground 5, p. 18, the commission affirms its original finding that the public good is not conditioned on a merger with NU. Our reasons for this conclusion are fully set forth at pp. 125-129 of our Report.

Grounds 6, 7 and 8 for rehearing pp. 18-20 Motion are interrelated and assert that the commission erred in not reviewing and determining in this proceeding a least cost plan. We affirm our acceptance of NU's commitment to abide by our existing and any future least cost planning requirements, and our finding that NU/PSNH will be required to comply with all resulting and future least cost integrated and other resource planning requirements of the commission in any case. Oversight of the least cost planning process is a continuing obligation of this commission as is NU's commitment to the commission's policy on

conservation and least cost planning. Least cost planning will assure that PSNH's utilization of the resources listed in the Twenty Year Resource Plan and made available by the Rate Agreement will result in rates that continue to be just and reasonable. For these reasons and those impressed in the commission report we deny grounds 6, 7, 8 of the Motion for Rehearing.

Ground 9 of the Motion avers that the commission erred in finding that the agreement was in the public good in regard to off-system sales. We affirm our finding regarding off-system sales. The commission evaluated and adopted Staff Recommendation 4 interpreting FPPAC so that "...energy and power costs flowing through to ratepayers will not include (i) the cost of any purchase of capacity made in order to replace a portion of PSNH capacity sold that causes PSNH to be

unable to meet its allocated capability responsibility or (ii) the incremental cost of energy required to replace energy from resources sold pursuant to capacity sales contracts entered into after the First Effective Date. Joint Recommendation at par. 4: Tr. May 25 at 86-89." Report at 97.

The commission balanced the interests of ratepayers in mitigating capacity costs to the extent of any impairment of allocated capacity responsibility and avoiding the burden of the incremental cost of energy required to replace energy from capacity resources sold in the future. Our analysis of capacity and energy exchanges also considers the benefits to New Hampshire ratepayers of capacity transfer agreements and the Sharing Agreement with NU resulting in a fair allocation of costs between PSNH and NU System

companies. Report at 170. As arbiter between the interests of the customers and the interests of regulated utilities, we exercised a balanced and fair judgment of the merits of overall capacity and energy revenues and, we believe, properly concluded that the public good was well served. RSA 363:17a.

Ground 10 challenges the commission's finding that the proposed financing for the merger acquisition will be in the public good, on the basis the commission made no finding that the IDA financing is either consistent with the public good or legally available as to the purpose anticipated or the projected amounts. The commission examined all aspects of the proposed financing and concluded that the proposed financing served the public good. Report at 139. In Table III, the embedded cost of debt of 10.25% included taxable IDB at 10.56%

and tax exempt IDB at 8.87%. Report at 138. We examined the terms and conditions of the financing and found that the issuance of the securities to finance the Joint Plan should be authorized as serving the public good. Report at 140.

Our examination of financial projections including costs of IDB pollution control revenue and refunding bonds lead to our conclusion that the Joint Plan may be financed and that projected revenues generated by reasonable rates will be adequate to support the capital structure and NU's (and affiliates) operations to provide safe, reliable and reasonably priced service. Report at 42. Appeal of Conservation Law Foundation of New England, Inc., 127 N.H. 606,614 (1986).

The commission specifically found that the issuance of up to \$120 million of tax exempt pollution control revenue

bonds by the New Hampshire Industrial Development Authority, the issuance of up to \$232.5 million of the exempt pollution control revenue bonds by the IBA and the issuance of up to \$300 million of taxable pollution control revenue bonds by IDA are consistent with the public good. Report at 186-187 approving NU's requested Approvals 15 J,K and L. These authorizations were subject to terms to be offered at the time of issuance.

Legal availability of IDA financing is implicit in this analysis. The commission is not obligated to determine whether the issuance of particular IDB's by the Industrial Development Authority is in the public good or within the scope of IDB's authority. The issuance of IDA's is within the discretion of the Governor and Council on recommendation by the IDA. RSA 162-I:9. If CRR succeeds in contravening the IDB financing, we

presume alternative financing means will be sought by NU and presented to this commission for review and approval.

Conclusion

The findings of the commission were supported by a preponderance of the evidence Hilberg/CRR have failed to sustain their burden of proving by a clear preponderance of the evidence that the commission order is unjust or unreasonable. RSA 541:13. On appeal, the N.H. Supreme Court should so find as a matter of law and should affirm the commission's report and order.

Our order will issue accordingly.

Concurring: August 17, 1990

John N. Nassikas
Special Commissioner
Presiding

Bruce B. Ellsworth
Commissioner

Linda G. Bisson
Commissioner

DR 89-244

NORTHEAST UTILITIES/

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

ORDER NO. 19,917

Based on the foregoing report, which is made a part hereof, it is hereby

ORDERED, that the Motion for Rehearing on Behalf of John Victor Hilberg and Campaign for Ratepayers Rights filed and supplemented on August 8, 1990, and amended by filing of August 13, 1990, is denied.

By order of the Public Utilities Commission of New Hampshire this seventeenth day of August, 1990.

<u>JOHN N. NASSIKAS</u>	<u>BRUCE B. ELLSWORTH</u>
John N. Nassikas	Bruce B. Ellsworth
Special Commissioner	Commissioner
Presiding	

LINDA G. BISSON
Linda G. Bisson
Commissioner

Attested by:

WYNN E. ARNOLD
Wynn E. Arnold
Executive Director & Secretary

APPENDIX G

DR 89-244

REORGANIZATION OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
MOTION FOR INTERVENE OUT OF TIME OF
ROBERT C. RICHARDS

This docket was opened by Order of Notice dated December 22, 1989, for commission investigation, pursuant to RSA 362-C, into whether a proposed Rate Agreement between the State of New Hampshire and Northeast Utilities regarding the bankruptcy reorganization of Public Service Company of New Hampshire (PSNH) is in the public good. In said Order of Notice, the commission established January 5, 1990, as the last day for submitting motions to intervene and scheduled a prehearing conference to address matters of intervention for January 10, 1990. Hearings on the merits began on April 9, 1990, and, except for

hearings on May 21-May 25, 1990 regarding rebuttal testimony, are scheduled to conclude on May 4, 1990.

On April 25, 1990, Robert C. Richards, a holder of 6,000 shares of common stock of PSNH, filed a petition to intervene in this docket. In his petition to intervene, Mr. Richards asserted that his only purpose for seeking intervention is to challenged the constitutionality of RSA 362-C and the rates that may be established pursuant thereto. His only stated interest in the outcome is as a PSNH shareholder.

At the request of the commission, Mr. Richards filed a supplement to his petition to intervene on April 26, 1990, in which he argued that:

1. RSA 362-C, the statute which authorizes the commission to conduct these proceedings, violates Part 1, Article 23 of the New Hampshire Constitution because it retroactively changes the "long established method of setting just and reasonable rates for

PSNH."

2. RSA 362-C is unconstitutional because it "denies investors in Public Service the right to 'just and reasonable rates' based upon the cost of property used and useful in the public service."

Finally, he argues that:

3. Neither the "United States Bankruptcy Code nor confirmation of the NU plan by the Bankruptcy Court preempts the responsibility of New Hampshire to set rates for Public Service in compliance with law and constitutions of New Hampshire and the United States."

II. POSITIONS OF THE PARTIES

Timely objections to Mr. Richards' motion to intervene were filed on April 30, 1990, by Northeast Utilities (NU), the Business and Industry Association of New Hampshire (BIA), the Office of the Attorney General (AG), PSNH, and the Official Committee of Equity Security Holders of PSNH, all of whom are parties to this proceeding. The parties essentially concurred in their objections stating, in summary:

1. Mr. Richards did not provide

substantial justification for his failure to submit a timely motion to intervene;

2. Mr. Richards' sole stated purpose for intervening is to challenge the constitutionality of RSA 362-C and the commission does not have the authority to review the constitutionality of its enabling statutes:

3. Mr. Richards' petition does not allege any personal interest which is distinct from other shareholders of PSNH and does not allege that his interest as a shareholder are not being adequately represented in this matter by PSNH;

4. Mr. Richards' alleged interests were recently adjudicated in a manner adverse to him in a matter before the United States Bankruptcy Court for the District of New Hampshire in the matter of the ongoing PSNH reorganization;

5. Mr. Richards' intervention would not serve the interests of justice and would impair the orderly and proper conduct of these proceedings.

III. APPLICABLE LAW

Matters of intervention are governed by RSA 541-A:17 which provides, in pertinent part:

541-A:17 Intervention

I. The presiding officer shall grant one or more petitions for intervention if:

(a) The petition is submitted in writing to the presiding officer, with copies mailed to all parties named in the presiding officer's notice of the hearing at least three (3) days before the hearing;

(b) The petition states facts demonstrating that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(c) The presiding officer determines that the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention.

II. The presiding officer may grant one or more petitions for intervention at any time, upon determining that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings.
...

V. The presiding officer shall render an order granting or denying each petition for intervention, specifying any conditions and briefly stating the reasons for the order. The presiding officer may modify the order at any time, stating the reasons for the modification.

IV COMMISSION ANALYSIS

It is uncontroverted that Mr. Richards' petition to intervene is untimely and, therefore, does not meet the requirements of RSA 541-A:17 I. Therefore, whether to grant the motion is at the discretion of the commission pursuant to RSA 541-A:17 II so long as the commission determines that such intervention would be in the interests of justice and would not impair the orderly and prompt conduct of the proceedings. We are unable to reach this determination and therefore will deny Mr. Richards' petition.

Mr. Richards' petition comes 110 days after the date established by the commission for interventions in this proceeding. Mr. Richards stated at a hearing on this docket on April 25, 1990, that his reason for filing late for intervention was the lack of resources and being preoccupied with the PSNH

bankruptcy proceedings. The commission does not deem these reasons to be substantial justification for the lateness of his filing and, for this reason alone, would deny the petition. However, there are also other reasons why Mr. Richards' petition should be denied.

As stated by the parties in their objections to Mr. Richards' petition to intervene, Mr. Richards has questionable standing to intervene in these proceedings as a stockholder of PSNH since any rights he may have as a stockholder are derived from PSNH, who is a full party to these proceedings.

Furthermore, his interests have been adjudicated in the United States Bankruptcy Court for the District of New Hampshire in Docket BK No. 88-43, In re: Public Service Company of New Hampshire. Mr. Richards has had a full opportunity before that tribunal in which

-
to litigate his interests and, in fact,
on April 30, 1990, Judge Yacos granted
Mr. Richards' request for an extension of
time to file a notice of appeal with
regard to that Court's order confirming
the third amended joint plan of
reorganization entered on April 20, 1990.

Mr. Richards' assertion that the
commission will not be applying the
principle of "just and reasonable rates"
in this proceeding is without merit. The
commission orders to date in these
proceedings have clearly indicated that
NU has the burden of proving that the
rates proposed under the rate agreement
are "just and reasonable." Had Mr.
Richards intervened at the commencement
of the proceedings, as he had a full
opportunity to do, he could have availed
himself of the various opportunities
afforded the parties by the commission to
recommend what the scope of the

proceedings should be.

Permitting Mr. Richards to intervene at this late date would impair the orderly and prompt conduct of these proceedings. The commission is operating under a tight time frame established by RSA 362-C which requires a final order by August 1, 1990. The commission and the parties cannot afford to address new issues at this late date, either a certification to the Supreme Court pursuant to RSA 365:22 or an appeal of the final commission order in the event the commission approves the rate agreement. Mr. Richards' request is especially egregious in that he purports to have no intent of participating in the proceedings so as to establish on the record a basis for his claims.

Neither New Hampshire law nor our state and federal constitutions guarantee to a utility a rate which assures its

financial integrity. Petition of PSNH,
130 NH 265, 277 (January 26, 1988).
Likewise, the owners of a public utility,
its shareholders, are not guaranteed a
risk-free investment. Relative rights of
the parties to the PSNH bankruptcy
proceedings relative to the Bankruptcy
Estate is a matter for resolution by the
Bankruptcy Court. Mr. Richards was a
full participant in these proceedings.
We find that Mr. Richards' intervention
will not serve the interests of justice
and will impair the orderly and proper
conduct of these proceedings.
Accordingly, for the reasons herein set
forth, Mr. Richards' Petition to
Intervene is denied.

Our order will issue accordingly.

Concurring

May 7, 1990

John N. Nassikas
Special Commissioner

Bruce B. Ellsworth
Commissioner

Linda G. Bisson
Commissioner

APPENDIX H

THE STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION

DOCKET NO DR 89-244
Petition of Northeast Utilities
Re PSNH Reorganization

REQUEST FOR REHEARING OF ORDER DENYING
PETITION TO INTERVENE
OF ROBERT C. RICHARDS

[EXTRACTS]

On April 25, 1990, Robert C. Richards petitioned to intervene in the above entitled docket. On May 7 , 1990, the Commission issued an order denying Petitioner's request. It was argued that Petitioner is like the Ghost of Hamlet's Father, seeking to influence the temporal world believing himself more real than the corporate body itself and the Commission has apparently decided, as urged, among other things that such a bodiless soul should not be permitted to wander the earth and complain of injury.

Petitioner hereby applies for rehearing of that order and, thinking the Hamlet analogy is rather apt in several respects, says in support thereof the following:

1. Is Petitioner to be or not, that is the question.

Whether 'tis nobler in the mind
For us, the Commission,
To allow the shareholders of Public
Service to suffer
The slings and arrows of outrageous
fortune,
Or let Petitioner stand against their
sea of troubles
And perhaps by opposing, end them.

Would that he would die, would sleep.
And by his sleep end the heartache
And the thousand natural rate-shocks
That consumers might be heir to:
'tis a consummation
Devoutly to be wished.

But if he dies, do we sleep?
Perchance to dream. Ay, there's the
rub;
For in his death, what dreams to us
may come
When we have shuffled off his mortal
coil,
Must give us pause. There's the
respect
That makes calamity of our long life;
For who would bear the whips and
scorns of Ratepayers,
The legislature's wrong, the
Governor's contumely,

When we could our quietus make
With a bare order? Who would such
fardels bear,
But that the dread of something after
his death,
Should make us rather bear those ills
we'll have
Than fly to others that we know not
of,

But can imagine.
For will it not be said throughout the
land
If Petitioner is denied standing,
That there is something rotten in the
State of New Hampshire.

2. For Petitioner pleads: List, list oh
list!

If thou didst ever New Hampshire love-
Prevent foul and most unnatural
murther
Of Public Service.

That incestuous adulterous Northeast,
With witchcraft of its wit, with
traitorous gifts,-
Has won to his lust
The will of seeming virtuous
management.
O Commission, what a falling-off was
there!
From the stockholders,
Whose unquestioning support was of
that dignity
That it went hand in hand with the vow
Management made to them, and then to
decline
Upon a wretch whose natural gifts were
poor
To those of theirs.

So while sleeping in their usual

orchards
The stockholders' custom always
Upon their secure hour, Northeast
stole,
With a cursed Rate Agreement

And in the porches of the legislature
Did pour that leprous distilment
That holds such an enmity with
stockholder value
That swift as quicksilver it coursed
through
The natural gates and alleys of the
body politic
And with a sudden vigor it did
Posset and curd, like eager droppings
into milk
The thin and wholesome law
And a most vile and unconstitutional
crust*
Did form on New Hampshire's smooth
body.

Thus, were the stockholders, sleeping,
By a brother's hand
Of life, of value, of management
dispatch'd.

If thou, Commission, have nature in
thee, bear it not.
Let not the State of New Hampshire be
A couch for luxury and damned incest.

* RSA 362-C.

★ ★ ★

APPENDIX I

THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

DR 89-244

Northeast Utilities Rate Case

PSNH OBJECTION TO ROBERT C. RICHARDS'
REQUEST FOR REHEARING OF ORDER DENYING
PETITION TO INTERVENE

[EXTRACTS]

Public Service Company of New Hampshire, (PSNH), a party to this proceeding, hereby objects to Robert C. Richards' Motion for Rehearing of Report and Order No. 19,814 denying Richards' Petition to Intervene, on the following grounds.

1. In response to Paragraph 1 and 2 of Richards' Motion for Rehearing, PSNH says:

Though japes of Hamlet's words
enrich his screed,
Its merits ne'er improve, their
lack remains.
Not Hamlet, but another Richard's

apt:
His horse is slain and all on foot
he fights.
He flails about, no succor for his
cry,
"Recourse! Recourse! My thing's done
for recourse!

* * *

APPENDIX J

DR 89-244

REORGANIZATION OF
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
MOTION FOR RECONSIDERATION OF DENIAL OF
INTERVENTION OF ROBERT C. RICHARDS

REPORT

On April 25, 1990, Robert C. Richards, a holder of 6000 shares of common stock of PSNH, filed a petition to intervene in this docket. the commission denied Mr. Richards' motion by order no. 19,814, dated May 7, 1990. the commission cited as reasons for its denial that, inter alia, Mr. Richards' petition was untimely in that it was filed 110 days after the date established by the commission for interventions in this proceeding. Mr. Richards has questionable standing to intervene as a stockholder of PSNH and Mr. Richards' interests were previously litigated before the United States

Bankruptcy Court for the District of New Hampshire in Docket BK no. 88-43, In re: Public Service Company of New Hampshire.

The intervention, if allowed, will impair the interests of justice and the orderly and prompt conduct of the proceedings. RSA 541-A:17.

Mr. Richards filed a timely motion for rehearing of order no. 19,814 on May 11, 1990. Mr. Richards did not raise any new substantive issues, except for an allusion to Hamlet, that were not raised in his original motion for intervention, as supplemented, or by the commission in its order no. 19,814 denying Mr. Richards' petition to intervene.

The petitioner's Hamlet analogy is an eloquent pleading. Alas, without avail. We cite Macbeth to place it all in perspective¹:

¹Macbeth V, v, 17

"She should have died hereafter;
There would have been a time for
such a word.
Tomorrow, and tomorrow, and
tomorrow,
Creeps in this petty pace from
day to day,
To the last syllable of recorded
time;
And all our yesterdays have
lighted fools
The way to dusty death. Out,
out, brief candle!
Life's but a walking shadow, a
poor player
That struts and frets his hour
upon the stage,
And then is heard no more; it is
a tale
Told by an idiot, full of sound
and fury,
Signifying nothing."

We will deny the petitioner's
request for a rehearing.

Our order will issue accordingly.

Concurring:

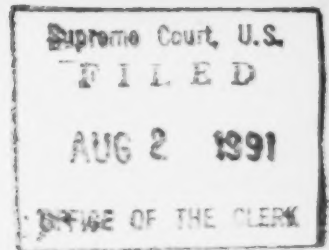
May 17, 1990

John N. Nassikas
Special Commissioner

Bruce B. Ellsworth
Commissioner

Linda G. Bisson
Commissioner

91-200



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN AND
MARTIN ROCHMAN

Petitioners

- v. -

THE STATE OF NEW HAMPSHIRE
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI
VOLUME III: APPENDICES K TO O

ROBERT C. RICHARDS*

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*Counsel of Record

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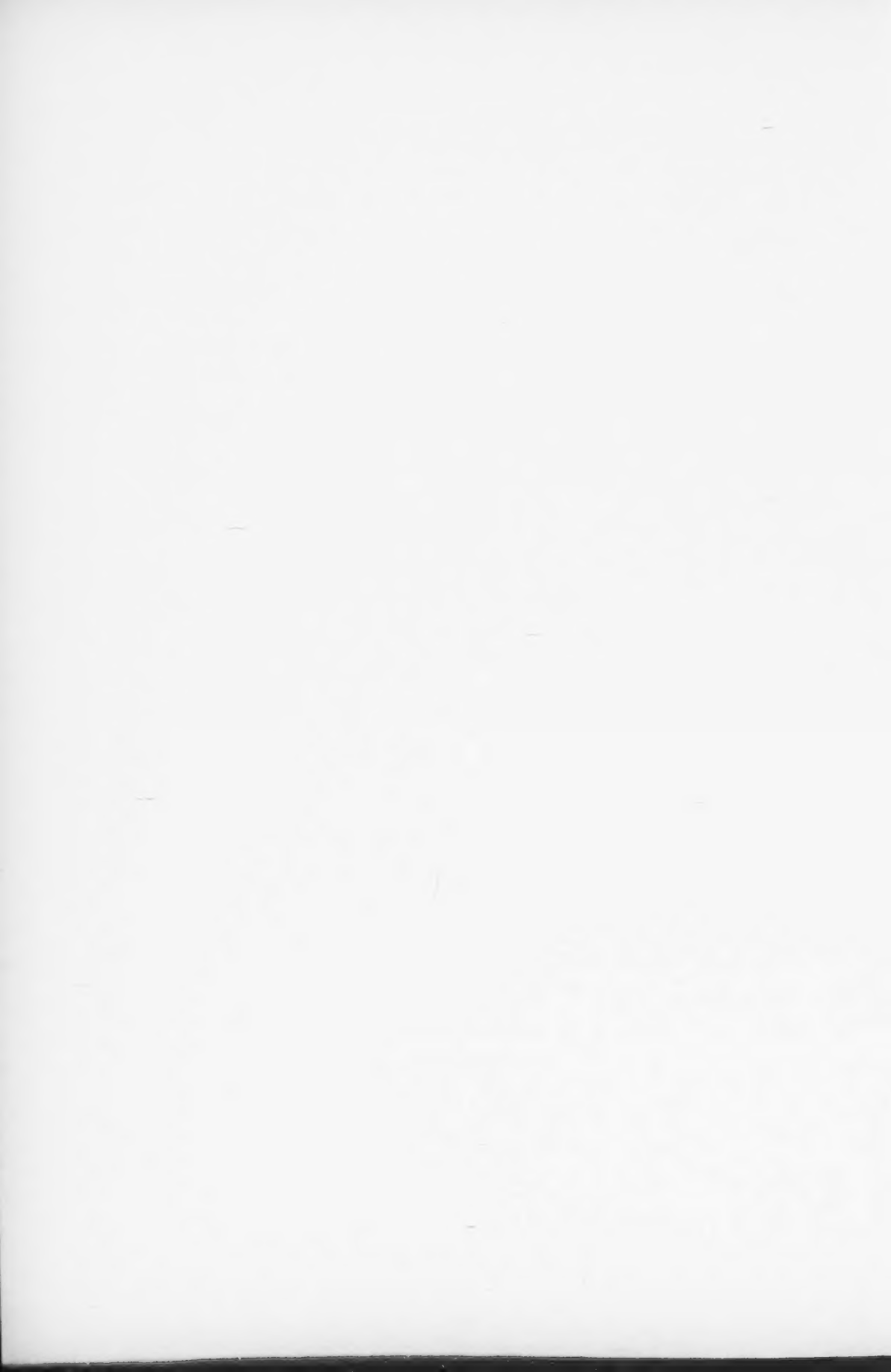


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APPENDIX K

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE,

BK NO. 88-43
CHAPTER 11

Debtor

MEMORANDUM OPINION ON "RKR" OBJECTIONS RE
CONFIRMATION OF PLAN OF REORGANIZATION

This Court by its "Order Confirming Third Amended Joint Plan of Reorganization" entered April 20, 1990 confirmed a \$2.3 billion plan of reorganization in this case proposed by Northeast Utilities Service Company ("NUSCO"), Public Service Company of New Hampshire ("PSNH"), the Official Committee of Unsecured Creditors, the Official Committee of Equity Security Holders, Citicorp, Consolidated Utilities & Communications, Inc. and Shearson Lehman Hutton, Inc., (collectively, the

"Proponents"), which plan had been filed by the Proponents on January 2, 1990 and was heard in a series of confirmation hearings spanning the period of April 4, 1990 to April 13, 1990.

The Confirmation Order was supported by this Court's "General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues" entered also on April 20, 1990 together with various supporting Memorandum Opinions dealing with various objections to confirmation and objections to claims. The Court in dealing with the various objections in those pleadings effectively disallowed some \$700 million in claims in this estate that were intertwined with objections to confirmation; dealt with a myriad of other objections including objections to the disclosure and voting procedures with acceptance of the plan of reorganization; and also denied the

objections of three common stockholders, Martin Rochman, Edward Kaufman, and Robert Richards ("RKR") contending that a Rate Agreement compromise with the State of New Hampshire embodied in the plan of reorganization was not fair and equitable and that the "best interests" requirement of Sec. 1129(a)(7) of the Bankruptcy Code was violated because the debtor could obtain greater value flowing down to the common stockholders by a litigated rate case with the State of New Hampshire.

The Court in dealing with the RKR objections made certain key findings on April 20, 1990, but due to the press of time in acting upon the pending plan of reorganization, deferred for further entry the setting forth of amplified findings and conclusions in support of the denial of these objections. This opinion therefore provides those

amplified findings and conclusions in support of the Confirming Order. The RKR objectors have been granted an appropriate extension of time, to file any notice of appeal from the Confirming Order, to a date subsequent to the entry of this Memorandum Opinion.

I. ISSUES AND RECORD

The issues raised by the RKR objections consumed most of the time during the confirmation hearings. While the record at times reads as though a utility rate case was going on before this Court it must be emphasized that notwithstanding the extensive testimony and cross-examination relating to rates, accounting methods, and ratemaking procedures, the issue before this Court raised by these objections is not what actual rate orders would be issued by the New Hampshire Public Utilities Commission ("NHPUC") if this plan were not confirmed

and a litigated rate case ensued, but rather whether the Rate Agreement embodied in the plan is a fair and equitable compromise in that regard under applicable bankruptcy reorganization case law and standards.

It also should be noted that considering the unique nature of this regulated public utility debtor, the Section 1129(a)(7) test of "best interests" is essentially the reverse side of the same "fair and equitable" issue, i.e., would common stockholders receive more net value if a chapter 7 trustee or and successor in interest conducted a litigated rate case with regard to the Seabrook investment.¹

¹Technically, the Section 1129(a)(7) test would only require a showing --- which is obvious here --- that liquidation of the debtor would produce less value than a going concern reorganization under a plan. However, due to the unique circumstances that no

During the course of the confirmation hearings the Proponents put on a number of expert witnesses with regard to utility operations, accounting methods, and ratemaking case procedures, to establish that the rates provided under the Rate Agreement in the plan were in fact fair and equitable in terms of what might come out of a litigated rate case. The RKR objectors put on no witnesses other than Mr. Richards himself. The case presented by the RKR

termination of electric service to the public would be permitted in the disposition of the assets of this debtor in a chapter 7 proceeding, the Court has throughout these proceedings indicated that an alternative application of the 1129(a)(7) standard would be appropriate to protect creditors and stockholders. As stated in the Disclosure Statement "[T]he Bankruptcy Court has stated that in applying the best interests test in this case it also will compare the value achieved by the Rate Agreement with the value that might be realized by the Debtor under traditional rate-making principles in a litigated rate case if Seabrook were to operate." [Disclosure Statement, Court Doc. No. 2998, p. 70]

objectors consisted primarily of extensive cross-examination of the witnesses put forward by the Proponents in those areas in which the testimony was found to be credible and persuasive notwithstanding cross-examination. In those areas in which a substantial dispute or question remains in the record the Court will so indicate.

II. KEY FINDINGS AND CONCLUSIONS

For ease of reference beyond the foregoing incorporation by reference, this Opinion will set forth at this point the pertinent provisions of Paragraph 28 of the Confirming Order dealing with the objections to confirmation here in questions:

Each of the Objections to Confirmation that have been filed is hereby overruled This also includes without limitation the Objections filed by the common stockholders, Martin Rochman, Edward Kaufman, and Robert Richards ("RKR"), referred to in Paragraph 69 of the General Findings and

Conclusions, contending that greater value could be realized for stockholders by a litigated rate case before the New Hampshire Public Utilities Commission as opposed to the compromise embodied in the Rate Agreement under the Plan. The credible evidence, however, supports a finding that PSNH could not recover substantially more under a traditional rate case than it would under the Plan because it is unlikely PSNH would recover significantly higher rates under a rate case. Even if PSNH were successful in obtaining higher rates, the impact of such rate hikes would likely lead to a loss of customers and loss of net revenue to PSNH, and ultimately to a lower return than that proposed under the Plan. Moreover, the expectable delay of approximately three years in obtaining the action by the NHPUC and the N.H. Supreme Court, with interest and other charges accruing to superior classes at approximately \$176 million per year makes it even more unlikely that rate increases of a magnitude sufficient to overcome this "additional hurdle" to getting value down to the common could be achieved. The sum total of the evidence before the Court on this issue supports a finding---here made---that the rate increase results under the Rate Agreement represents a fair and equitable settlement and compromise well within the range of results reasonably expectable in a litigated rate case. The RKR Objection contending that a rate case would

result in more value for the Debtor than that proposed under the Plan is hereby denied for the reasons set forth above.

Likewise, for ease of reference and incorporation, the supporting Findings and Conclusions included in Section G Paragraph 60-70 of the General Findings of Fact and Conclusions of Law entered April 20, 1990, are set forth as follows:

G. 1129(a)(7)

60. Acceptance of the Plan by the impaired classes has not been unanimous. Therefore, the Plan must provide each holder of a claim or interest that has not accepted the Plan with an amount equal to or greater than the amount he, she or it would receive under chapter 7.

61. In determining the liquidation value of the Debtor, the Court will look first to the breakup value of PSNH. If the Debtor were sold in parts, the evidence in the record suggests that the value of the pieces is less than the Debtor's going concern value. As stated in the expert testimony presented by NUSCO's financial advisors, while some pieces of the Debtor might have value independent of their inclusion in an integrated electric utility, many of the Debtor's assets do not.

In addition, if multiple parties bought pieces of the Debtor it is not clear who, if anyone, would bear the responsibility to serve the PSNH customers. Because of this uncertainty, it is highly unlikely that the State would permit the Debtor to be sold in pieces. If PSNH were sold in pieces, it would bring less than what is being offered under this Plan.

62. An alternative liquidation analysis of PSNH would be the value of PSNH sold as a going concern. The liquidation value of the Debtor as a going concern is found to be no higher than the value that is proposed under this Plan. This bankruptcy has been in effect an auction of PSNH, which has been highly publicized and generated national attention and several substantial and serious bidders. Three utility companies with competent counsel and financial advisors competed actively to submit a winning plan proposal.

63. The significant publicity surrounding this bankruptcy has assured that any interested potential bidder was informed about this case. Interested bidders had many opportunities to negotiate with the Committees, the Debtor, and the State under the special procedures adopted by the Court for this unique case. The unusual problem of "valuation circularity" presented by a chapter 11 reorganization of a regulated monopoly utility company, and the special procedures employed

in this reorganization case to deal with that unique problem, have been discussed at some length in prior opinions of this Court. See, e.g., In re PSNH, 88 B.R. 521 (Bankr. D.H.H.1988); In Re PSNH, 88 B.R. 546 (Bankr. D.N.H. 1988); In re psnh 99 B.R.155 (Bankr. D.N.H. 1989); In re PSNH, 99 B.R. 177 (Bankr.D.N.H. 1989); In re PSNH, 108 B.R.854 (Bankr. D.N.H. 1989).

64. The plan that ultimately succeeded in attracting the support of the Committees was the plan that offered the most value for the Debtor. A Commission of the Federal Energy Regulatory Commission has stated that this auction assured that maximum value was paid for the Debtor. Therefore, the Court finds that the liquidation value of the Debtor is no more than what has been offered for the Debtor in this Proposed Plan.

65. The Debtor would not command as high a price in a normal chapter 7 liquidation because of the value added to the Debtor by the Rate Agreement entered into with the State. This Rate Agreement provides certainty for the purchaser of the Debtor about rates than can be charged and, therefore, revenues that will be generated, without the delay and cost of litigation. A sale of the Debtor without the Rate Agreement would not command as high a price because the purchaser would discount the value of the Debtor to account for this uncertainty.

66. This Plan, therefore, provides more to the creditors than they would receive under a normal chapter 7 liquidation for the following reasons:

a. The liquidation value of the company in a chapter 7 would not be as high as it is for this chapter 11 Reorganization;

b. In a chapter 7 bankruptcy, there would be a significantly greater number and amount of unsecured creditor claims resulting from the rejection of contracts. In particular, rejection of the contracts with the small power producers alone would generate additional claims of more than \$600,000,000. In addition, there would be the time element and administrative expense of a chapter 7 liquidation which would increase the administrative expenses of the bankruptcy and force the claim and interest holders to wait until the bankruptcy was concluded before receiving any dividend from the estate. Furthermore, interest on secured debt would continue to accrue.

c. In a liquidation, the Court finds that insufficient funds would be generated to pay the full amount of unsecured claims. There would be no distribution with respect to interests in a liquidation.

67. The suggestion that the State could take over the Debtor by eminent domain or otherwise, so as to preserve more value for the estate, is mere conjecture and speculation. There is no evidence that the State has any interest in taking over the Debtor. Even if the State had expressed such an interest, there is no legal authority or financing capacity for the State to take over the Debtor for a value greater than that proposed under this Plan. The New Hampshire General Court has recently passed a bill which would legislate the New Hampshire Energy Authority out of existence.

68. There is no reason whatsoever to conclude that the United State would ever take over the Debtor or Seabrook.

69. The final approach to liquidation and analysis of this decidedly unique Debtor --- wherein it or its successor or successors in no event will cease to supply electricity to customers in New Hampshire --- is to consider a non-normal liquidation scenario comparing the return to the estate under the Plan with the return the Debtor or its successors could expect to receive under a traditional ratemaking proceeding for its interest in the Seabrook plant. The Court itself during the disclosure statement hearings and proceedings insisted this alternative be set out for the consideration of creditors and

stockholders before they were called to vote upon the Plan. the objections to the confirmation filed by common stockholders Rochman, Kaufman, and Richards ("RKR") generally raise this issue in the sense that they question the appropriateness of the Rate Agreement and compromise embodied in the Plan and argue that more value could be realized for shareholders if the Plan is denied confirmation and either the debtor-in-possession or its successors were authorized to pursue a litigated rate case before the NHPUC. This contention is considered and rejected in the confirming order entered separately this date. There is no requisite showing that the members of the impaired classes would receive more under a litigated rate case than is provided for them under the Plan. Section 1129(a)(7) therefore is satisfied under the alternative liquidation analysis approach as well.

70. The Court accordingly determines, in consideration of all the foregoing, that holders of claims or interests will receive under the Plan property with a present value not less than that they would receive under a chapter 7 liquidation of the Debtor under either a breakup value analysis, an auction sale analysis, or a rate case analysis.

III. APPLICABLE LEGAL STANDARD

The Supreme Court in 1968 set out

the basic approach for a reorganization court in evaluating a substantial compromise involved as part of the plan of reorganization in Protective Committee v. Anderson, 390 U.S. 414 (1968). the Court there reversed an order confirming a reorganization plan under chapter X of the prior Bankruptcy Act in that it found that the reorganization court had not exercised the close enough judgment and review of the proposed compromise, sufficient to reach an informed view of the fair and equitable nature of the compromise. The Supreme Court set forth the basic standard to be followed in this situation as follows:

Compromises are "a normal part of the process of reorganization." Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939). In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts. At the same time,

however, it is essential that every important determination in reorganization proceedings receive the "informed, independent judgement" of the bankruptcy court. National Surety Co. v. Criell, 289 U.S. 426, 4236 (1933). The requirements of §§174 and 221(2) of Chapter X, 52 Stat. 891, 897, 11 U.S.C. §§574, 621(2), that plans of reorganization be both "fair and equitable," apply to compromises just as to other aspects of reorganizations. Ashbach v. Kirtley, 289 F.2d 159 (C>A> 8th Cir. 1961); Conway v. Silesian-American Corp., 186 F.2d 201 (C.A. 2d Cir. 1950). The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable. In re Chicago Rapid Transit Co., 196 F.2d 484 (C.a. 7th Cir. 1952). There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such

litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise with the likely rewards of litigation. It is here that we must start in the present case.

When a substantial compromise is embodied in a reorganization which effectively "short-circuits" the formal provisions required for plan confirmation under chapter 11 of the Bankruptcy Code, the courts have not hesitated to apply the general requirements for evaluating compromises in reorganization proceedings as first announced in the Anderson case. See, e.g., In re Continental Investment Corp., 642 F.2d 1, 4 (1st Cir. 1981); In re Emerald Oil Company, 807 F.2d 1234, 1239 (5th Cir. 1987); In re American Reserve Corp., 841 F. 2d 159, 162 (7th Cir. 1987); In re A & C Properties, 784 F.2d 1377, 1382-1383 (9th Cir. 1986); Matter of Texas Extrusion Corp., 844 F.

1142, 1158-1159 (5th Cir. 1988); Reiss v. Hagmann, 881 F. 2d 890, 892 (10th Cir. 1989). Indeed, the policy underlying the application of this standard is so strong that it has been held to apply equally to pre-confirmation compromises presented during the course of reorganization proceedings under the Bankruptcy Code. In re Aweco, 725 F.2d 293 (5th Cir. 1984) cert. denied, 469 U.S. 880 (1984).

The Court of Appeals for the First Circuit has noted that there have to be some limits as to the degree of detail on the underlying controversy that must be examined by the trial court before considering approval of the compromise and settlement. The court of Appeals stated in Greenspun v. Bogan, 492 F. 2d 375, 381 (1st Cir. 1974) the following:

The settlement might not be so favorable to CMI as would a final judgment on the merits. But any settlement is the result of a compromise --- each party

surrendering something in order to prevent unprofitable litigation, and the risks and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See United Founders Life Ins. Co. v. consumer's National Life Ins. Co., 447 F. 2d 647 (7th Cir. 1971); Florida Trailer & Equipment Co. v. Deal, 284 F. 2d 567, 571 (5th Cir. 1960).

Bankruptcy Rule 9019 establishes the discretionary power of a bankruptcy court to approve or disapprove compromises or settlements. It has been held that in the exercise of that discretionary power it is not necessary for the bankruptcy court to decide questions of law or fact raised by objectors. In re Teltronics Services, Inc., 762 F.2d 185 (2d Cir. 1985).

The reorganization court in In re Texaco Inc., 84 B.R. 893 (Bankr. S.D.N.Y. 1988), appeal dismissed, 92 B.R. 38 (S.D.N.Y.1988) was presented with the

question of confirmation of a plan of reorganization which included within itself a compromise of a judgment claim held by a creditor, Pennzoil, in the amount of \$11.3 billion for a settlement amount of \$3 billion pursuant to the plan. The court approved the compromise as part of the confirmation of the plan of reorganization and noted [84 B.R. at 902] the following:

(1) The balance between the likelihood of plaintiff's or defendants' success should the case go to trial vis a vis the concrete present and future benefits held forth by the settlement without the expense and delay of a trial and subsequent appellate procedures.

(2) The prospect of complex and protracted litigation if the settlement is not approved.

(3) The proportion of the class members who do not object or who affirmatively support the proposed settlement.

(4) The competency and experience of counsel who support the settlement.

(5) The relative benefits to be received by individuals or groups within the class.

(6) The nature and breadth of releases to be obtained by the directors and officers as a result of the settlement.

(7) the extent to which the settlement is truly the product of "arm-length" bargaining, and not of fraud or collusion.

See Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414 (1968); In re W.T. Grant Co., 699 F. 2d 599 (2d Cir. 1983), cert. denied , sub nom; Casoff v. Rodman, 464 U.S. 822, 104 S. Ct. 89, 78 L.Ed 2d 97 (1983).

IV. THE SEABROOK INVESTMENT

Construction and Cost

PSNH began construction of a nuclear power plant at Seabrook, New Hampshire after receiving a siting certificate in 1974. PSNH was the lead utility with regard to the Seabrook project,

originally holding 50 percent of ownership of the proposed plant along with a number of other joint owners compromising the major utilities in New England. PSNH's original ownership interest was reduced to 35.6 percent by various agreements and sales involving the other joint owners in the early 1980s.

The Seabrook plant was originally planned as a two-unit nuclear power plant (having two nuclear reactors) with a projected total cost of approximately \$1.3 billion with completion projected for Unit I for November of 1979. On May 7, 1979 the State of New Hampshire enacted legislation (commonly referred to as the "anti-CWIP" law) which prohibited any recovery in rates for any construction costs expended by a utility in construction of a plant until such plant was actually on line producing

power commercially. [RSA \$
378.30-a] Notwithstanding this
development, - which in effect
substantially increased the cost of
completion of the Seabrook plant (due to
the need to borrow money at interest to
cover the cost of completion until the
plant could go on line)PSNH management
and the other joint owners determined to
proceed with completion of the Seabrook
plant.

As events turned out, only one unit
of the plant was completed and that did not
occur until October of 1986. Since that
date, due to various delays in getting a
full operating license from the Nuclear
Regulatory Commission, and the delay in
these chapter 11 proceedings which were
commenced on January 28, 1988, the total
cost of the Seabrook plant with all
carrying costs and interest charges as of
January 1, 1990 is approximately \$6.5

billion. Of that total investment, the amount invested by PSNH itself as a joint owner, as of January 1, 1990, was approximately \$2.9 billion.

It is this greatly escalated cost of the Seabrook plant, and the ultimately inability of PSNH to borrow sufficient monies to cover its public debenture debt incurred in financing the construction of the plant until it could go on line, that led to the chapter 11 petition filed by PSNH on January 28, 1988. The NRC finally issued a full operating license on March 1, 1990, and the Seabrook plant is expected to proceed into commercial operation within the next few months. An appeal from the NRC decision is pending.

The chapter 11 filing followed by tow days a decision by the New Hampshire Supreme Court not to permit "emergency" rate increases necessary for covering

pressing PSNH public debt payments in the face of the Anti-CWIP statute. See Petition of Public Service Company of New Hampshire, 130 N.H. 265 (1988). The same escalated Seabrook plant construction and delay costs, and the question of how much of those costs would be recoverable in a litigated rate case before the New Hampshire Public Utilities Commission, is at the nub of the RKR objections to confirmation. The Confirmed Plan provides in effect for recovery of between \$1.4 billion and \$1.54 billion (depending on various contingencies) of the \$2.9 billion that PSNH invested in the Seabrook plant.

Excess Cost Plants

It was no secret during the 1980s and before that utility companies throughout the nation were having trouble getting full recovery of their investments in "excess cost" power

plants. This development had to do primarily with regard to nuclear power plants that had precipitated unprecedented controversy and delay due to citizen groups asserting various safety and environmental concerns. Articles appeared in the professional literature regarding this novel problem for regulated utilities. Such utilities had been accustomed during the earlier decades of this century to almost automatic recovery of costs expended for new plants from the various state regulatory commissions. See e.g. Pierce, "The Regulatory Treatment of Mistakes in Retrospect: Cancel Plants in Excess Capacity", 132 U. of Pa. Law Review 497 (1984); Goldsmith, "Utility Rates and 'Takings'". 10 Energy Law Journal, 241 (1989). See also, general discussion of "two tumultuous decades" for electric utility companies in an article by

Charles M. Studness, "The Electric Utilities During the 1970s and 1980s," Public Utilities Fortnightly, Vol. 125, pp. 40-47 (February 15, 1990).

The phenomenon of the "white elephant" nuclear power plant, with costs so high that utility rates to customers would have to reach unprecedented levels to recover the such costs, was not a topic restricted to professional journals. The Wall Street Journal in an Op-Ed article on October 9, 1984, entitled "Whom to Soak When Utilities Take a Bath?" led the article with a paragraph stating: "Electric utility's construction costs, mainly for nuclear plants, have mushroomed into a multi-billion dollar cloud of doom over the industry." A later lead article on October 2, 1986, on page one of the Wall Street Journal, was entitled: "'Prudency Reviews' Are Changing the Way Utilities

Set Rates: Regulators' Scrutiny Results
in Big Costs Disallowances for Some
Nuclear Plants."

The 1987 Write-Down

Robert M. Busch, Senior Vice President of Finance and Chief Financial Officer of Northeast Utilities, testified that the PSNH board properly wrote down Seabrook in early 1988 (for the 1987 year financial reports) and that that accounting decision was appropriate at the time. The PSNH write-down was approximately \$1 billion of \$2.9 billion investment. It was based essentially on the "unreasonable possibility of full recovery" of Seabrook's costs. Many other utilities had to write-down nuclear power plant costs --- even before regulators required it. The witness himself did it for NUSCO for its Seabrook share ownership two years ago. The PSNH change in accounting was shown at page 38 of its

Form 10K Report to the SEC for the 1987 calendar year.

PSNH's cost per Kilowatt ("KW") hour was 8 cents at that time. It would be 16 cents if all Seabrook costs were recovered with approximately a 89 percent one-time increase. The general rates in New England run about 7 1/2 cents on average. PSNH clearly could not charge 16 cents without suffering substantial defections by commercial and industrial users. Management realized the severe ramifications of the 1988 write-down of Seabrook on the books of PSNH. They realized that would lead the NHPUC to claim that amount as a cap in any rate litigation. But they determined that they couldn't recover more than \$1.8 billion and that continuing to carry the full Seabrook costs on the books would be misleading to investors. The change was made on their general financial

statements.

PSNH did not change the Form 1 (the so-called "regulatory books" submitted to various regulatory agencies) because they wanted to preserve higher value for Seabrook power if that power became more valuable in the future (for example, if oil prices escalated again) and higher value also contingent upon the appeal then pending in U.S. Supreme Court. The Form 1 is filed with FERC as well as with NHPUC.

Bruce W. Wiggett is the comptroller of Public Service Company of New Hampshire. Wiggett testified that Assistant Attorney General Larry M. Smuckler (now Chairman of the NHPUC) stated during the negotiations on the plan of reorganization that PSNH would never recover more than the \$1.8 billion that management had indicated was recoverable.

The Examiner appointed by the Court in this proceeding, Paul L. Gioia, who served as Chairman of the New York State Public Service Commission during most of the 1980s, also indicated that the fact of the 1987 write-down would be given serious weight in a regulatory proceeding as to the upper limits of cost recoveries even though the write-down would not be legally binding upon a regulatory commission.

Andrew B. Herf is a partner in the Accounting and Auditing Group of Arthur Andersen and Company. He has worked for that company for about 20 years. His specialty is the public utility area. Herf testified at length about the 1987 write-down by PSNH management. [See Transcript, Court Doc, No. 3722, pp. 246-269] He noted that PSNH in its 1987 write-down eliminated equity items and replaced "regulatory interest" with

"commercial interest." This amounted to an approximate \$1 billion reduction to a \$1.8 billion asset value for Seabrook. To Herf, the fact that management did not continue to capitalize interest after the write-down (although they had done so before and could have continued to do so under accepted accounting principles) meant that management felt that the \$1.8 billion was a ceiling. Herf testified that one reason management could know in 1988 that they couldn't get the other \$1 billion out of Seabrook was simply that Seabrook at a \$6,000 to \$7000 KW capacity cost was not economic when compared to capacity costs of other plants running in the \$2000 to \$3000 per KW range. Herf testified that if that were true in 1987, its is even more true today with a more

intense competitive environment.² Under the plan the KW capacity cost would be approximately \$3,500.

V. THE PLAN/COMPROMISE

The Plan Auction

Robert M. Spann is a senior consultant for Charles River Associates, an economic and management consulting firm with offices in Boston and Washington, D.C., as well as a lecturer in economics at George Washington University. His area of expertise is regulatory economics and finance and high thrust economics and statistics. He has a B.S., a Masters, and an Ph.D in economics

² At the conclusion of the Disclosure Statement process in November of 1988, the court required the debtor to indicate the maximum it would seek in a litigated rate case --- for disclosure purposes on the range of results regarding the compromise --- and Mr. Levin for the debtor stated in open court that the company would not seek more than \$1.8 billion in recovery of Seabrook costs in a litigated rate case.

from North Carolina State University. Spann testified that in view of the "auction" of PSNH which occurred during the course of these reorganization proceedings, by virtue of the multiple competing plans filed, if the company were worth more "with the rate case to go forward" another buyer would have come in and offered more under "market" conditions.

John F. Curley is managing director in the Merchant Banking Department of Morgan Stanley, an investment banking firm. He has worked with that company since 1978. He has a B.A. and MBA from Dartmouth College. Curley testified that the NUSCO plan offered the highest value available in view of the fully publicized auction process over a clearly sufficient time period of two years to attract market interest and in view of the fact that four legitimate bidders (all being

substantial regional utility companies) did enter the bidding process.

The Plan Compromises

Seabrook is valued in the plan at \$700 million, plus an "acquisition premium" of another \$700 million, for a total \$1.4 billion in Seabrook value. The calculations with regard to value according to Curley are \$2.3 billion in plan value, comprised of \$900 million for assets other than Seabrook and \$1.4 billion of Seabrook costs to be recovered. The Seabrook recovery however could be up to \$1.54 billion depending on other variables and contingencies. The Rate Agreement, which includes the Seabrook recovery, was negotiated constantly up to the final NUSCO plan being joined in by the committees. There was no agreement on rates before a plan agreed to by the major parties was presented.

Curley testified at length as to the \$2.3 billion in values intended to be realized under the NUSCO plan. He also testified as to the step 1 and step 2 implementation procedures with regard to the plan. Under the plan, NUSCO would need to raise an initial \$458 million in cash on the effective date and has \$300 million of that already committed. A total of \$1.357 billion to \$1.457 billion will ultimately be required to fund all cash payments under the plan.

Morgan Stanley is "highly confident" that it can sell the securities on the rates and terms indicated to fund the plan under both steps. It has given a letter to that effect. The Rate Agreement is essential to confidence in the markets to purchase the securities according to Curley. It is critical in that regard that the seven years of fixed rate path and three years of additional stability

in rates under the Rate Agreement be available for marketing the securities. Moreover, the return on equity "collar" included in the Rate Agreement gives additional comfort in that no one can predict everything that may occur over 10 years and the collar, in effect, protects against items that might have been missed in the projections for all sides.

Curley also testified at length as to feasibility and performance by the reorganized debtor under the plan, including the strong management regarding nuclear plants and the excess winter-time capacity and other synergies that NUSCO "brings to the table" as additional value under the plan.³ He testified that the

³NUSCO'S peak load, due primarily to air conditioning, occurs in the summer; the peak load of New Hampshire, due primarily to skiing, occurs in the winter. This Court rejoices in being on the right side of that particular synergy.

value attributable to the equity holders, Classes 11, 12 and 13, would range from \$170 million to \$500 million depending on various contingencies. He testified further that both the Official Committees and the State of New Hampshire wanted to litigate the rate case initially but finally decided that a negotiated rate agreement was in the common interest. Curley was actively engaged in the negotiations for NUSCO.

Wilber L. Ross, Jr. is employed by Rothschild Inc. He has been involved in many large bankruptcy reorganization cases in the United States as a financial advisor to a major party in interest. He has a B.A. from Yale University and an MBA from Harvard University. Ross testified for NUSCO regarding the difficulty in the negotiations that led to the consensual plan. Ross was the investment banker retained by the Equity

Committee. Essentially, the negotiations ultimately resolved down to "give-ups" by various senior interests to let value go down to the equity holders. These items included \$218 million in post-petition interest claims given up by the unsecured creditors and \$145 million of pre-petition dividends and \$99 million of post-petition dividends by the preferred shareholders. The Equity Committee was the principal party threatening a litigated rate case in the negotiations.

Price Paths/Charts

Peter Fox-Penner is the Vice President of Charles River Associate. He has a B.A. in electrical engineering from the University of Illinois, a Master's in mechanical engineering from the University of Illinois, and a PhD in economics from the University of Chicago. His doctoral dissertation, and other post-graduate publications have concerned

electric utility regulation. His specialty at Charles River Associates is electrical utility matters. His clients are national in scale. He testified as to the calculations on a "price path" and an "equilibrium price path." The latter concept examines a sequence of prices over time to include consistency in price/revenue planning in terms of actual revenues to be collected.

Penner prepared and identified the two charts (NUSCO Exhibits 8 and 9) which illustrate the range of utility rates in New England with a black line on Exhibit 8 representing the price path under the reorganization plan. The black line is in the red band (the top 20 percent of the chart) until 1997. The plan prices therefore are higher than the prices charged to 80 to 90 percent of all other electric power customers in New England. [Transcript, Court Document No. 3672, p.

176] The price path on the chart does take into account expected losses to self-generation, fuel switching, and the resulting lower use of electricity.

The second (broken) line on Exhibit 9 shows RKR's idea of a maximum "constitutional rate path" in the view of witness Spann. This shows 18-cent to 19-cent rates as opposed to a New England average of 7 1/2 cents. Actually, RKR rates would be 16 to 17 cents but the witness assumed loss of sales from the high rates so raised the rates necessary to actually collect the entire \$2.9 billion of Seabrook costs.¹ The chart does not consider municipalization dangers.

¹The RKR objectors argue that they would use a long-term "phase-in" of the Seabrook higher recovery and could ameliorate the indicated rate shock. However, this long-term proposal encounters significant other problems discussed below.

The top of the red band on chart Exhibit 8 is not the breakpoint which would cause a death spiral of ever increasing defections from the system prompting still higher rates causing further defections. Rates could go appreciably higher if allowed by the NHPUC. When rates do go too high, the "death spiral" means that you not only lose the increased rates, but all rates from customers who go off the system.

Phase-In Approaches/Limits

In Spann's view "phase-in" approaches, while ameliorating the "rate shock" impact by allowing lower initial rates for A Seabrook recovery, just mean that "you collect larger dollars later rather than now." Spann testified that "phase-ins" have benefits and costs, i.e., there is no such thing as free lunch.

Full Seabrook Recovery

Busch testified there is no reasonable way that the \$2.9 billion cost of Seabrook could be put into a rate base in view of competitive pressures and other economic considerations. A phase-in would ultimately require more than \$2.9 billion in recovery. Spann testified that if you tried for a \$2.9 billion recovery over 10 years, you would probably start at about 13 cents early on but by mid-decade rates would go over the line and above 20 cents. This assumes the 10-year maximum phase-in period that accountants require. PSNH at the time of the 1987 write-down of Seabrook estimated a one-time rate increase of 130 percent would be necessary for recovering Seabrook costs. That increase currently is estimated at 89 percent. The drop from 130 percent to 89 percent regarding the increase to recover Seabrook costs was related, among other things, to lower

fuel oil costs under current market conditions; the fact that the cost of equity variable dropped significantly during the time period after 1987; and that the net revenues were up and other asset values fluctuated.

One-Time 31 Percent Increase

The RKR objectors rely heavily on the reference in the Disclosure Statement (p.73) to the Bower-Rohr Study (Bower Rohr & Associates) commissioned by the debtor in early 1989 stating that a one time rate increase of 31 percent, plus yearly inflation increases thereafter, would be affordable. The reference indicates that the "normal" rate increase discussed would be an average and assumes the actual increases would vary among customers classes.² Rates now charged

²There is no indication in this record as to how such increases would vary, i.e., how or whether existing "rate design" practices of the NHPUC would be

are approximately 9 cents per KW hour.

An increase of 31 percent the first year and then increases with inflation assumed to be 4 percent per year would result in high rates existing nowhere in New England except on "island" or "peninsulas" having special requirements. The prices would be 12 cents at the outset. Wiggett recognized the Bower-Rohr study indicated a 31 percent rate increase would be bearable, but he expressed the opinion it was not feasible due to economic and political realities and the uncertainties as to the actual effects of such an increase. The Business and Industry Association for one would react to such an increase as "absurd" and has indicated that more than a five percent increase in rates will induce industry to leave New Hampshire.

changed.

The Bower-Rohr Report discussion of a rate increase of 31 percent is before the court only in terms of the brief discussion of the Report that is included in the Disclosure Statement. The report is not in evidence before the court nor were witnesses called by the RKR objectors to testify directly as to the conclusions reached.³

Off-Load Danger

David E. Kleinschmidt is a senior consultant in the Engineering Science of Arthur D. Little, an international planning and technology consulting company. He has worked for this company since 1976, and specializes in utility and power generation technology. He has

³The Bower-Rohr 31 percent reference in the Disclosure Statement is a fact but was put there by Court direction only to alert equity holders to the alternative arguments as to bearable rates. It was there for voting purposes only. It is not independent evidence that such rates would be collectable.

a B.A. in chemical engineering from MIT, and a Master's from MIT. He has particular expertise with regard to power-generation, co-generation, and self-generation matters.

Kleinschmidt conducted a survey and interviews with substantial commercial user candidates during the period between November 1988 and January 1989 with a follow-up in March of 1990. They involved some seventeen likely candidates for going off the system.

Kleinschmidt testified at length as to his study; ran a model with a ten-year simulation; discussed generation systems "easily purchased"; and the marketing effects going on in New Hampshire currently in that regard. He testified that significant self-generation is already occurring in New Hampshire and that it would be a serious threat with greatly increased electric

rates.

Kleinschmidt testified further as to other factors involved and noted that the perception of where electric rates are going is very important --- more so than the actual current rates. From his survey, he noted that companies who are likely candidates for self-generation or co-generation are largely aware of the reorganization case and are waiting to see what happens. He found that they have already crossed the "psychological barrier" and so would be ready to decide on self-generation rapidly and implement the same in the face of substantial rate changes.

Kleinschmidt testified that the loss of demand over 10 years due to the increased rates would be approximately 45 MGW; or in other terms lost sales of 280,000 MGW hours per year. This translates to a loss of 1 1/2 years of

growth. He testified that the large commercial customers were the most likely to go off the system and that you would not only lose their revenues but those customers typically cost less to service so you have a doubly negative economic effect. Presently, there is some 50 MGW in capacity by co-generation of industrial customers of PSNH. There is at least that much capacity in self-generation and considerably more if waste-to-energy plants are included.

The Examiner's questions to Kleinschmidt suggested that changes in "rate design" (i.e. reducing the higher, subsidizing rates typically charged industrial customers) could cut down the off-load danger of higher rates. The witness did not think the off-load danger here could be covered by that device. Moreover, disturbing the rate design subsidy pattern would probably provoke a

violent legislative reaction.⁴

Curley also testified, with regard to the off-load danger, that you don't lump all customers in this type of analysis, since you would lose the most profitable customers and also lose the more dense load as well.

Municipalization

William G. Moss is Vice President of the Energy Group at Charles River Associates, where he has been employed for six years. He specializes in microeconomic, statistics and econometrics with a focus on energy and other regulated industries. He has a B.A. and Ph.D in economics from the University

⁴It is noteworthy that in the recent "PSNH legislation" concerning the Rate Agreement that the New Hampshire legislature took special care to forbid any altering of rate design by the reorganization company without approval by the legislature itself. See N.H.R.S.A. 362-C:8 (December 18, 1989), which is attached as Exhibit G to the Disclosure Statement.

of California at Berkeley.

Moss has studied municipalization attempts during 1970-1989 and found 79 such attempts. He concluded it was a viable option in New Hampshire but probably would not occur under the NUSCO plan. It would probably occur at a 1 1/2 to 2 cent per KW hour increase.

Of the 79 municipalization attempts that Moss studied, 20 resulted in municipalization and 23 are still pending. Of the 20 that succeeded, they tended to involve small municipalities of up to 10,000 customers. However, major municipalization attempts are pending with regard to New Orleans and Chicago.

Wiggett, the controller of PSNH, testified regarding the studies done in Nashua, New Hampshire in 1987 and 1988 considering possible municipalization. The city put the matter on hold pending the bankruptcy resolution. The third

broken line on chart Exhibit 9 shows the effects of a hypothetical municipalization of Nashua, New Hampshire. The rates literally "go off the chart" under that scenario. The resulting twenty cent rates would mean PSNH would suffer a serious loss of its most profitable business.

On cross-examination, Wiggett admitted that gain from a sale of utility property due to a municipalization would go to the bottom line for investors but "in the long run it would not be good because the company would be losing revenue from a lot of customers."

Transmission Access

Penner testified that you can't effectively charge more than costs for a transmission access because of NHPUC and FERC regulatory policies fostering competition. A newly-formed utility company serving Concord and Exeter, New

Hampshire, in fact did recently go off the PSNH system and forced PSNH to run other purchased power through PSNH's lines at cost after a proceeding before the NHPUC.

VI. LITIGATED RATE CASE

Commission Ratemaking/Process

During the course of the hearings the Court requested that the State of New Hampshire file a non-adversarial memorandum of exposition setting forth the basic procedures and principles with regard to ratemaking and rate cases under New Hampshire law. That memorandum, filed April 11, 1990 as Court Document No. 3572, with certain non-material deletions, is excerpted and attached as an Annex to this Opinion. The Court also received a Supplemental Report from the Examiner on this matter, filed April 6, 1990, as Court Document No. 3455. As noted above, the Examiner himself has

served as Chairman of a major state public utility commission. The following extracts from the Examiner's Supplemental Report, which extracts I deem to be non-adversarial in this context, are useful in setting forth the general principles and procedures relating to ratemaking for regulated monopoly public utility companies:

For ratemaking purpose, a utility's costs are broken down into two basic types, operating expenses and capital costs. An operating expense is generally defined as a good or service which will be consumed by the utility within one year. These include costs such as fuel, labor, insurance and taxes. While not readily apparent, depreciation is included as an operating expense since it represents one year of economic wear and tear on the utility's equipment.

Capital costs are the costs associated with financing the utility's investment in assets that provide service to the public. The "rate base" is made up of utility assets that will provide service for more than one year. The value of these assets

is generally calculated on the basis of prudent original cost less depreciation, and is limited to assets that have been financed by funds provided by utility investors and not other sources (such as customer deposits or tax benefits).

Once the rate base has been established, the PUC must determine the "rate of return" that the utility should earn on the rate base. The cost of debt securities is relatively easy to determine since they usually carry a fixed rate of interest. The same is generally true for preferred stock. The cost of common equity invested in the utility, however, is more difficult to ascertain, since for most utilities the return demanded by common stockholders is determined by the financial market and is constantly changing.

* * *

The ratemaking process may be expressed as a simple formula: " $R = O + (B \times r)$ ", where R is the utility's allowed revenue requirement; O is its allowed operating expense; B is its rate base, defined as cost less depreciation of the utility's property that is used and useful in the public service, . . . and r is the rate of return allowed on the rate base." Appeal of Conservation Law Foundation of

New England, inc., 127 N.H. 606,
633-34, 507 A.2d 652 (1986)
(citations omitted).

* * *

A PUC usually operates pursuant to a broad statutory authorization with a general mandate to establish "just and reasonable" rates [see RSA 374:2; 378.] without specific direction as to how that is to be accomplished. PUCs normally adopt extensive rules and regulations, within the broad framework of their statutory authorization, that govern their regulation of utilities. PUCs also develop policies with respect to specific issues relating to utility regulation. The regulations and policies adopted by a PUC are subject to change whenever the PUC concludes that the public interest so requires.

In the early days of utility regulation, legislatures set rates for utilities, including railroads and early gas and electric companies. That approach proved unsatisfactory for many reasons, including the perception that utilities had gained undue influence through the lobbying of legislator and that the legislative process is not well-suited for dealing with the complex issues related to utility regulation.

The rate setting process is often referred to as a

legislative function, reflecting the fact that it was originally exercised by legislatures before being delegated to PUCs. The rate setting function is also referred to as legislative, as distinguished from judicial, to indicate that PUCs have broad discretion and, unlike judicial officers, are not disinterested arbiters between contesting parties, but represent the public and have a direct responsibility to protect the public interest in safe and adequate service.

Ratesetting, however, is also referred to as 'quasi-judicial', which reflects the fact that PUCs' administrative proceedings have become relatively formal and parties who appear before them are expected to be accorded a fair hearing and reasonable treatment. Furthermore, PUC ratesetting decisions must be based on the record developed in a proceeding, and are subject to judicial review. Judicial review, however, is limited and the courts are required to respect the broad discretion and expertise of the PUC.

The record includes considerable discussion as to why we have regulatory commissions with regard to electric power companies and regarding the "legislative

nature" of the NHPUC as one aspect of its activities. Busch testified that commissions were created not simply to insulate from political pressures, but primarily because the subject was "too arcane" for the legislature to deal with. He agreed that utility regulators have great flexibility but noted that they still have to exercise that discretion on a record and not arbitrarily. Busch testified that regulatory discretion is always a risk but there is more risk "if 420 legislator are doing it."

Curley testified that there are "tons of subsidies" (also expressed as a "plate of spaghetti") in the way utilities are regulated by PUCs, i.e. the PUC tends to allow "the farmer at the end of the line" to get electricity at affordable costs by in effect requiring other customers to subsidize some of that

cost. PUCs simply would not allow dumping of all of the costs of the customers that go off the system upon the "little people" who have to take electricity no matter what it costs.

Wiggett has been involved in many NHPUC proceedings and testified emphatically that the process is not a simple equation with the "four factors" set forth in the literature. The company has the burden and must put on persuasive evidence; competition is a factor; and the company "cannot price itself out of the market."

Herf testified that you cannot predict exactly what PSNH would get in a rate case but that the \$2.3 billion company value under the plan is within the reasonable range of outcomes of a contested rate case. Herf also testified that the rate arena and the regulatory-political environment the utility is in

has to be considered with regard to rate cases and rate levels.

Return on Equity

Busch testified regarding how return on equity is determined, including a discussion of "forcing shareholders to sell stock below book value." Richards cross-examined Spann at length regarding the debt-equity ratio testimony and cost and return on equity calculations, etc. The return on equity level for PSNH in 1986-87 pursuant to PUC orders was 15 percent. Wiggett agreed with Richards' point that return on equity can be defined as the return that must be paid to induce common stockholders to buy stock at a price above book value. The concept of "dilution" therefore means selling shares below book value. Wiggett testified however that "dilution" was not a factor in any rate case with which he has been involved. Herf testified that

there are many, many way to calculate return on equity.⁵

Seabrook Rate Case/Delay

Seabrook is the most expensive nuclear plant ever built, for its

⁵ A leading treatise echoes this thought and the "circular question" problem that has been endemic to this reorganization case: "The most difficult problem in determining the overall cost of capital arises in estimating the cost of equity capital. The relevant question is: How much must a utility earn to induce investors to hold and to continue to buy common stock? In answering this question, it is important to realize that circular reasoning is involved. In the absence of a fixed, expressed, or implied commitment as to the dividend rate, the actual cost of floating a stock issue is indeterminate. Investors' decisions are largely based on a utility's expected earnings and upon their stability, as well as upon alternative uses of investment funds. Yet, since the allowable amount of earnings is the object of a rate case, a commission's decision, in turn, will affect investors' decisions." Phillips, The Regulations of Public Utilities, p. 375, Pub. Util. Reports, Inc. (1988) Cf. also the "Between Scylla and Charybdis" reference by Justice Holmes in Cedar Rapids Gas & Light Co. v. Cedar Rapids, 223 U.S. 655, 669 (1912).

capacity, and probably would result in a write-off of 50 to 60 percent in a litigated rate case, according to the testimony of witness Spann. He also testified that PUCs nationally are requiring a "performance clause" even when nuclear power plants are allowed into rate base. The objective is to be able to suspend cost recovery when, as often is the case, the plants are not operating due to various problems. If the NHPUC required this in a Seabrook rate order, even assuming the higher recovery in a litigated rate case under the RKR assumptions, the company would be back in the bankruptcy court when Seabrook had its first operational problem, although it purportedly would have a right to recover all its Seabrook costs. It was obvious according to Spann that if Seabrook costs two to three times more than any other plant the PUC would

look at that as a factor in determining rates.

Ross calculated \$2.68 billion in claims ahead of the common stockholders in the absence of a consensual plan as of the time of the confirmation hearings. Accordingly, if the plan is not confirmed, the litigated rate case would have to produce \$2.68 billion in total company value, plus \$176 million per year until a new plan could be confirmed before distributions made under a new plan could reach down to common stockholders after covering the full rights of the senior classes. The \$176 million a year is comprised of \$135 million per year accruing on post-petition interest on the unsecured claims and \$41 million per year on post-petition dividends to the preferred shareholders.

Wiggett testified that he didn't believe that the company would get the

full \$1.8 billion from the PUC; he estimated that it was more probable that it would get \$1.4 billion to \$1.5 billion. PSNH in a rate case would seek return on equity that would attract stock investors at a price above book value.

There would be negotiations in a rate case with regard to future Seabrook operational contingencies even apart from the items regarding recovery of the costs of Seabrook. The negotiated rate plan has protections with regard to those future contingencies.

Robert C. Richards is an attorney and also holds PSNH common stock. He acted as attorney for the RKR objectors and also testified himself at the hearings. Richards was an attorney for the Long Island Lighting Company from 1971 to 1984. From 1984 to 1989 he was a member of the Strategic Planning Department and the Financial Planning

Department of LILCO during the time of construction of the troubled Shoreham nuclear power plant on Long Island. He has a B.A in math from Yale University, a J.D. from Harvard University and an MBA from New York University.

Richards testified that he believed that the company could get "much greater value" because of the New Hampshire law regarding recovering prudent investments; that the Bower-Rohr Report indicating a 31 percent increase plus inflation thereafter would be bearable should have been relied upon; and that alternatively PSNH could charge the NUSCO plan rates then continue thereafter with inflation for greater value. He argued that almost no burden has been imposed upon ratepayers under the new NUSCO plan since no rate increases occurred during the chapter 11 in 1988-1989 and that rate levels will go down after 2000 A.D. under

his analysis. He feels this is unfair. He testified that the rates in 20001 and after would be less than the New England regional average.

Richards' basic argument revolves around his question of "who should pay for what the politicians in Massachusetts and New Hampshire did to PSNH?" He refers to the anti-CWIP law that drove up costs and was "a bet" that Seabrook would not run; that the investors won that bet so they should get the recovery regardless of the \$6000 to \$70000 KW capacity cost; and that the big cost in Seabrook was the interest cost and delay cost that should not have happened.⁶

Richards testified generally to these matters at the April 12, 1990 hearing. [Transcript, Court Document No.

⁶It is true that \$1.6 billion of the total \$2.9 billion of PSNH's Seabrook cost is comprised of carrying charges.

Effects of RKR Proposal

The RKR proposal assumes, according to witness Spann, \$2.5 billion worth of debt. Spann here was dealing with the RKR alternative of a 31 percent initial increase followed by 4 percent per year after that. [Transcript, Court Document No. 3688, pp. 86-89] This would be 70 percent of the \$3.6 billion value ascribed to the company under that proposal. This debt-equity ratio would be much higher than all but 4.7 percent of publicly-held companies of all types reported in the leading statistical publication. It is unheard of for a utility company.

The \$2.5 billion debt instead of \$1.6 billion debt under the plan would mean 50 percent higher fixed debt service costs. If the debt were only backed by Seabrook the reorganized company would

have to pay higher interest costs according to Spann. The company would have a "razor-thin margin" if anything went wrong and would very likely be right back in the bankruptcy court if that occurred. Spann noted recent experiences with the Boston Edison Nuclear Power Plant involving considerable down-time of that plant. Spann expressed the view that the debt required under the RKR proposal would in effect be "contingent notes on the Seabrook performance for 20 years." Seabrook income uninterrupted would be essential to servicing a \$2.5 billion debt for the reorganized company. The market would react accordingly so that even if the RKR rates were obtained from the NHPUC the debtor still would not realized the greater value due to the 70 percent debt-equity ratio.

Richards' admitted that his proposal would not satisfy currently applicable

accounting guidelines. He referred to his formula as "a phase-in to last for the entire life of the asset" referring to the projected 39 year expected life span of the Seabrook plant. Richards also admitted that his "present worth to annuity" concept and formula has not actually been used in any ratemaking case so far.

Questions by the Examiner brought out that the real impact of the depreciation and cost recovery approach put forth by Richards is in the later years, beyond the 10 year period testified to by Richards, and that you would really need to extend the projections considerably to see the actual effects of that proposal. There would be a very large deferred account that would have to be amortized in the future. [Transcript, Court Document No. 3739, pp. 121-125]

The RKR proposal also ignores the fact that stock investors look at net income and dividends and gives no real consideration to what happens to utility stock if the utility quits paying dividends because there are no retained earnings. The fact is the market price for the shares would drop. [Transcript, Court Document No. 3739, pp. 131-135]

Richards was asked how the company would finance new debt borrowings for ordinary operating purposes if it was showing losses or low earnings on its books until ultimately recovering through high rates in the future. Richards' response was that analysts would see big increases in rates coming and the company would be in good shape in a few years, i.e. there would be good cash flow but no earnings. [Transcript, Court Document No. 3739, pp. 191-192] As indicated above, however, this has never

been actually accomplished in real world market conditions. Generally, the RKR objector' contentions were presented as part of a highly theoretical construct. [Transcript, Court Document No. 3739, pp. 156-179]

GAAP/FASB Accounting

In reporting the value of its investment in Seabrook PSNH was bound by Generally Accepted Accounting Principles ("G.A.A.P."). Historically PSNH had accounted for Seabrook in accordance with Financial Accounting Standard No. 71 ("FAS-71"), promulgated by the Financial Accounting Standards Board ("FASB"), which sets forth the accounting principles and rules for regulated utilities. When a power plant is accounted for under FAS-71, the plant construction costs and an allowance for funds used during construction ("AFUDC"), which represents a reasonable return on

both the debt and equity invested into the project, are added into the cost of the asset and capitalized on the utility's balance sheet. The premise for adding in AFUDC is the expectation that it will be recovered when the power plant goes into service. The standards for FAS-71 accounting require a utility to be: (1) subject to ratemaking by an independent regulatory body; (2) with ratemaking done on the basis of cost; (3) by a regulatory commission that is able to set rates than can be both billed and collected.

If a utility determines it no longer meets the criteria for FAS-71 accounting it must cease FAS-71 accounting for an asset and switch to traditional accounting analysis. When PSNH ceased FAS-71 accounting for Seabrook it reaccounted for the entire asset under traditional commercial accounting

methods. PSNH removed all AFUDC from its valuation of Seabrook and replace it with capitalized interest.

Under FAS-71 the company had to reverse its accounting for Seabrook in 1987, according to Wiggett, since PSNH could not recover the cost of seabrook at rates that were collectable. FAS-71 also restricts any "phase-in" to require that those deferred costs must be recovered within 10 years. If the company can't recover them in 10 years, it has to write the value down and "you can't carry it as an asset." If a company goes off FAS-71 then it can no longer capitalize return on equity but it could continue to capitalize debt return i.e. interest.

The Financial Accounting Standards Board was created because "the SEC never did it" according to witness Herf. These are independent accounting experts who are supposed to provide a "due process

procedure" before promulgating their accounting guidelines. The SEC adopts the FASB rules for registrants under their jurisdiction. There would also be ethical rule problems regarding a "clean statement" by a CPA auditing firm, if FASB guidelines were not met, pursuant to rules of the American Institute of Certified Public Accountants. A public company realistically needs such a CPA statement in order to sell securities. In the mid-1980s the FASB entity was concerned with the fact that "regulators were designing rate plans that pushed off cost recovery long into the future." Some utilities tried such schemes before the FASB promulgation but they went back to the PUCs to get rid of them primarily because of Wall Street concerns rather than GAAP.

Herf testified that underwriters put heavy pressure on management to use GAAP.

Herf further testified that all "sinking fund" devices make accountants nervous because the later year costs are usually higher and you have less years to recover those costs. With a nuclear power plant you commonly also have retrofitting expenses, and other unanticipated operational expenses, so you don't smooth out the costs as anticipated under a sinking fund device in actuality.

The utility industry fought the 10-year rule in the FASB hearings vigorously, but FASB concluded that "if you can't get it done in 10 years" the utility has substantial uncertainty regarding recoverability.

The RKR unconventional depreciation and cost recovery proposal would not be allowed under GAAP. Wiggett recognized the existence of unconventional theories regarding recovering of greater costs over a longer time --- or other

accounting approaches to depreciation involving excess costs plants --- but that such theories were not realistic because the SEC in effect would freeze securities sales if such non-GAAP devices were employed. In his and Herf's view, as a practical matter, a company cannot be a public entity without GAAP accounting.⁷

Other Seabrook Recoveries

Busch testified at length regarding UI's recovering of 57 percent of Seabrook --- indicating it was actually more because of recovery of construction costs

⁷Herf emphasized that uniquely in the regulated utility environment "you can drive revenue requirements by depreciation" and that this could have significant back-loading effects that is the basic reason for rejecting novel "economic depreciation" methods for such companies. Herf testified in great detail regarding GAAP and FASB accounting matters at the April 11, 1990 hearing. [Transcript, Court Document No. 3722, pp. 144-188, 194-205, 209-226]

during construction. With regard to the Millstone Plant in Connecticut, NUSCO wrote off \$110 million originally but the PUC ultimately forced a settlement involving a \$400 million writeoff. The Examiner points out that the larger the dollar figures involved in an excess cost plant the higher the percentage write-down will be and that PSNH had a larger share of Seabrook than UI or NUSCO. He notes that on a more appropriate KW capacity cost basis, in a survey of allowed nuclear power plant recoveries, the PSNH recovery under the plan is within the range of other recoveries.

Other Nuclear Plant Recoveries

There are no actual write-offs of 50 percent or more in recovery of nuclear power plant costs. Herf testified that he has studied nuclear plants having high costs of \$4,000 KW capacity costs or over and having 900 MGW or over in size, and

found nine plants in that category. However, he indicates there are a whole host of variables in that you cannot really predict from these cases the possible Seabrook write-down in a regulatory proceeding.

VII GENERAL CONCLUSION

The objections to confirmation by the RKR objectors on the basis that significantly greater rates and enterprise value could be obtained for the company by a litigated rate case, as opposed to the results obtained under the Rate Agreement embodied in the Plan of Reorganization, boil down to two essential points: (1) that except for a very small portion PSNH's expenditures in completing the Seabrook plant were all prudently incurred and therefore would justify and require NHPUC approval of full recovery of such prudently incurred costs under applicable statutory and

constitutional requirements; and (2) that PSNH could ameliorate the "rate shock" effect of full recovery of such costs by employing a "phase-in" recovery together with recovery well beyond the 10-year period applicable under currently accepted accounting standards by the use of some imaginative though unconventional deferred costs recovery mechanisms.

With regard to the prudent investment recovery point, the objectors see this principle as a fixed star governing what the regulatory agency can do with regard to the recovery of costs associated with the Seabrook nuclear power plant, and argue further that the requirement is of constitutional dimension. The Supreme Court of the United States however has expressly declined to adopt prudent investment recovery as a constitutional standard. Duquesne Light Co. v. Barasch, 109 S.Ct.

609, 619-20 (1989). The auction which all courts have exhibited in avoiding an exclusive focus on prudent investment as a cost recovery standard stems from the desire to avoid an unwarranted incentive for over capacity generation by public utilities. See Pierce, "The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity", 132 U. of Pa. Law Review 497 (1984).

New Hampshire itself, in its statutory and regulatory framework, has both the "prudent" and a "used and useful" standard in this regard, undergirded by the ultimate "just and reasonable rates" statutory language provided in NH RSA 378:7. This legal framework for regulatory action is a far cry from the simplistic "prudence only" position put forward by the objectors. It obviously implies a balancing to cover both the initial analysis at the

beginning of the plant construction as well as the ultimate effect of the plant coming on line at a particular time and at a particular cost.

The New Hampshire PUC and the New Hampshire Supreme Court gave ample warnings to PSNH in this regard in various ruling issued during the course of the Seabrook plant financing and construction. See, e.g., Petition of Public Service Co. of New Hampshire, 130 N.H. 265 (N.H. 1988); Appeal of Public Service Co. of New Hampshire, 130 N.H. 748 (N.H. 1988); Re Public Service Co. of New Hampshire, 70 N.H.P.U.C. 886, 904 (1985); Re Public Service Co. of New Hampshire 68 N.H.P.U.C 668, 670 (1983); Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 223, 231-2 (1982); Re Public Service Co. of New Hampshire, 67 N.H.P.U.C. 490, 525 (1982); Re Public Service Co. of New Hampshire, 65

N.H.P.U.C. 492, 493 (1980).

The New Hampshire Public Utilities Commission said clearly and unmistakably in 1985 in Re Public Service Co. of New Hampshire, 66 PUR 4th 349, 70 NHPUC 164, 246, 247 (1985):

If in a subsequent rate proceeding it is found that part of the capital investment in Seabrook I is imprudent so as to cause excessive and burdensome rates not economically justified, the Commission may disallow part of the Seabrook investment.

* * *

While there are constitutional guarantees of the opportunity to earn a fair return, rates may not be "prohibitive, exorbitant, or unduly burdensome to the public." (262 U.S. at p. 290, footnote 2, PUR1923C at p.201, footnote 2.) The essential reconciliation of prudent investment and reasonable, not unduly burdensome rates may be accomplished in a rate proceeding when PSNH seeks rate support for the addition of Seabrook to its rate base. A prudence investigation should be initiated by the Commission on a timely basis to assure an in-depth analysis of prudent investment and the reasonable rate level for a fair return to

investors without unduly burdening ratepayers.

Similarly, in Appeal of Public Service of New Hampshire, 122 N.H. 1062, 1076 (N.H. 1982) the New Hampshire Supreme Court stated:

Thus, while management in the first instance may be free generally to make its own decision about its level of investment in new construction, see Appeal of Legislative Utility Consumers' Council, 120 N.H. 173, 175, 412 A. 2d 738, 739 (1980), it must bear in mind that as a regulated company not all costs may be recovered from the public when the plant is completed.

A vested right to build is not a vested right to have customers pay. PSNH itself agrees that the PUC may reject management decisions "[w]hen inefficiency, improvidence, economic waste, abuse of discretion, or action inimical to the public interest are shown." Re Public Service Company Util. Consumers' Council v. Public Util. Com., 117 N.H. 972, 380 A.2d 1083 (1977).

And, again, in 1986, the New Hampshire Supreme Court explained in Appeal of Conservation Law Foundation of

647 (1986):

[T]he principles of prudence and usefulness . . . are significantly different in at least one respect that is of great potential significance for the treatment of Unit I expenditure in the light of what due care required at the time an investment or expenditure was planned and made, usefulness judges its value at the time its reflection in the rate base is under consideration.- Under the "used and useful" principle, the commission is not asked to second-guess what was reasonable at some time in the past, but rather to determine what can reasonably be done now with the fruits of investment. It is therefore not surprising that the commission's flexibility in applying the usefulness principle extends to judgments about the inclusion or not of investment in property held for future use. See LUCC, 119 N.H. at 343-44, 402 A.2d at 633-34; N.H. Gas & Elec., 88 N.H. at 55, 184 A. at 605; C. PHILIPS, Jr., supra at 316.

* * *

[I]t is important to bear in mind, as Commissioner Aeschliman's separate opinion indicates, that the principle of used and useful property will also be applicable in determining

rate base. In the face of rate issues that are unparalleled in the State's history, we should recall that the usefulness principle lends itself to development over time and under new conditions . . . We therefore attend seriously to the suggestions of the separate opinion, that the burden of excess capacity that may be created by such giant projects may appropriately be shared as between investors and customers. . . . , and that the usefulness principle may be applied to effect such a shared allocation. (Citations omitted.)

The legitimate ratemaking expectations of PSNH and its investors under New Hampshire law are summed up in the decision in Petition of Public Service Co. of New Hampshire, 130 N.H. 265, 280 (1988) as follows:

Any vested right which the company [had] when it commenced construction was a right to the constitutional guarantees of [Federal Power Commission v. Hope Natural Gas Company], 320 U.S. 521, 64 S.Ct. 281, 88 L.Ed. 333 (1944); namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has

not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary.

It should also be remembered that New Hampshire is a state that does not have as statutory framework which requires prior PUC approval for power plants to be constructed by its regulated utilities. PSNH itself decided to build the Seabrook plant and decided to continue to build the plant even after the costs skyrocketed for various reasons.

The Supreme Court of the United States has indicated in dicta that a "shift in methodologies" by a state

regulatory agency in midstream with regard to the construction of a regulated utility plant might present a question of constitutional due process violation as a "taking" if shown. See Duquesne Light Co. v. Barasch, 109 S. Ct. 609, 619 (1989) ("The risks a utility faces are in large part defined by the rate methodology because utilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks. Consequently, a State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions.") In the present case the Court inquired as to whether the objectors could show any such shift in ratemaking methodologies on the

part of the New Hampshire which might present a basis for constitutionally-required full recovery of Seabrook costs but in my judgment the objectors were unable to point to any such shift.

This Court does not need to determine for present purposes whether PSNH in a litigated rate case could not obtain some additional rate increases and value for the company but simply whether there is a substantial basis for the expectation voiced by the objectors that such a proceeding would result in recovery in anything close of full cost recovery for the Seabrook plant. It may well be, as objectors argue, that it would be shown in such a proceeding that only a small fraction of the Seabrook construction costs could be considered imprudent in the sense of mismanagement, negligence, or wasteful construction activity. But that cramped view of the

"prudence" concept no longer can be assumed to be a controlling factor in the current regulatory ratemaking process.

The concepts of "prudence" and "used and useful" according to the record before me, and the applicable case law, are evolving concepts that regulators are using to effectuate an appropriate balance in the sharing of costs associated with excess cost power plants between ratepayers and investors. In other words, it is at least arguable, notwithstanding the best management and control of costs in the actual construction of a plant, that the decision to go forward with the construction and completion of the plant may be deemed imprudent if it will result in a power plant coming on line with electricity too expensive to be used at the high rates necessitated by full recovery of the associated construction

costs. Cf . In re Western Massachusetts Electric Co., 80 PUR 4th 479, 542 (Mass. D.P.U. 1986). the same broadened meaning of the "used and useful" concept could also arguably can be applied to effectuate a sharing of costs of such a plant, as indicated in the New Hampshire decisions cited above. The very concept of excess capacity created by a plant too expensive for customers to use is a phenomenon largely attributable to the experience in recent years of massive cost overruns with regard to nuclear power plants.⁸

⁸The phenomenon was recognized however in other contexts as early as 1949 by the New Hampshire Supreme Court as noted in In re New England Telephone & Telegraph Co. v. State, 95 N.H. 353, 360 (1949), "If as the report of the Commission implies, construction undertaken by the [c]ompany is 'wasteful' or its expense is unwarranted by the demand probable at the necessary price for service produced by it, . . . unwarranted investments may be excluded from rate base, and unjustified expenditures from the determination of a

Even apart from any effect that the 1987 write-down might have in a rate case, the record before me independently establishes that it would be unlikely that PSNH could recover appreciably more than \$1.8 billion in recovery of Seabrook costs in a litigated rate case, and that it is quite uncertain whether even the \$1.8 billion is realistically achievable. This record emphatically establishes PSNH in a litigated rate case would have to face vigorous and sustained opposition by the State of New Hampshire, together with various active citizen groups opposing Seabrook and its associated costs.

The argument would be made that at some point in the late 1970s and early 1980s it had to be obvious to PSNH management that the kilowatt capacity costs and charge rates per kilowatt hour

reasonable return." (Emphasis added)

attributable to full recovery of the Seabrook construction and completion costs were going out of sight; that the company had numerous warnings from the NHPUC and the New Hampshire Supreme Court regarding the ultimate balancing that would have to be done in determining the reasonable rates for the company; that the GAAP accounting realities would limit any phase-in and deferral of costs to a 10-year maximum period; and that at a total cost recovery level the collectable rates that could be charged and recovered in the real world simply would not support full recovery of the Seabrook investment.

If it were assumed for present purpose that PSNH could establish in a litigated rate case that it was "entitled" to full recovery of its Seabrook investment, under current ratemaking principles, the record does

not indicate any likelihood that such costs could be recovered out of rates within a time frame permissible under current accounting and regulatory policies. The evidence is uniform that under current accounting standards and practices no regulated utility has been able to show as current assets on its financial statements any assets whose costs could not be recovered in a 10-year period.

While the RKR objectors have put forward interesting and imaginative arguments and theories as to why GAAP principles and the FAS-71 requirement should be disregarded in this context, to permit greater recovery over a longer time period of the Seabrook costs, that accounting approach admittedly is unconventional and has not been used by any utility or regulatory agency to date. If such an unconventional approach is to

be established it probably will require a strong, highly solvent utility with the necessary financial staying power to litigate the matter in a regulatory proceeding and associated appeals for the time necessary to overturn the current accounting and regulatory practices in that regard. PSNH simply is not in that strong financial position and therefore this Court cannot find a reasonable likelihood that if it denied confirmation of the pending Plan the company in fact would achieve the "breakthrough" in current practices that the objectors desire.

Moreover, regardless of a successful result in a regulatory proceeding, to adopt unconventional cost recovery and accounting practices with regard to the Seabrook plant, there still remains the "real world" effect of such practices in terms of reaction by the financial

markets and utility analysts who would be essential to the issuance of future securities and public debt necessary, not only for the initial cash requirements of a reorganization plan, but also necessary to finance the reorganized company's ongoing operations. The record before me is replete with various question marks and uncertainties as to the market reaction in that regard that could interject into any renewed reorganization plan proceedings a significant question of feasibility in terms of such necessary financing and access to the capital markets in that context.

Finally, it has to be recognized that while Court for present purposes has to balance various "likelihoods" in making a surface determination as to whether the plan compromise is fair and equitable, and a better result than could be obtained in a litigated rate case, the

one thing that is not uncertain is the inexorable accruing of further massive amounts of additional claims by the senior interests above the common stockholders during the period of delay necessary to achieve the greater value in a litigated rate case. It is the net result that is crucial to the equation in evaluating the position of the common stockholders. In my judgement it is likely that it would take approximately three years to get through the 18-month NHPUC process and the inevitable appeals in the New Hampshire Supreme Court and the United States Supreme Court. However, even if it were assumed that the novel position espoused by the RKR objectors could be established in only two years, that lesser period of delay still would result in such substantial additional obligations ahead of the common stockholders that it would be very

unlikely that the net result of value flowing down to the common stockholders would be appreciably greater than that presently available under the confirmed plan of reorganization.⁹

Accordingly, for all the reasons indicated above, the Court concludes that the Rate Agreement compromise embodied in the Plan of Reorganization is within the range of expectable results from a litigated rate case and is in fact fair and equitable in the circumstances; and furthermore that the Plan does not violate the provisions Section 1129(a) (7) of the Bankruptcy Code in that the class

⁹During their oral argument on this matter counsel for the Creditors Committee stated that for the creditor group itself the company would "need to get a homerun in the Seabrook rate case to cover us" when the costs of delay are considered. Counsel for the Equity Committee amended that by noting that "the numbers are so large, you don't have to hit a homerun, you have to hit a grand slam. . . ."

to which the objecting common stockholders belong would not in any event achieve a greater recovery if the Plan is denied confirmation and the case proceeded under Chapter 7 of the Code.

DATED at Manchester, New Hampshire
this 17th day of May, 1990.

JAMES E. YACOS

JAMES E. YACOS
BANKRUPTCY JUDGE

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ANNEX

MEMORANDUM OF THE STATE OF NEW HAMPSHIRE REGARDING THE UTILITY RATEMAKING PROCESS

(Docket No. 33572 - Filed April 11, 1990)

E X T R A C T S

The State of New Hampshire submits this Memorandum in response to the request of the Court made at the hearing held on April 5, 1990, relating to the proposed confirmation of the Third Amended Joint Plan of Reorganization filed by Northeast Utilities Service Company, et al.

* * *

I. Nature and Role of PUC in Ratemaking

No public utility is permitted to charge any amount for any service except as provided in its tariff on public file at the Commission. At its most basic, then, a rate proceeding is a process by which the Commission approves changes in tariff provisions.

The New Hampshire Supreme Court has characterized tariff provisions as involving more than contractual obligations of the utility and its customers. Tariff provisions have the "force of law". See Appeal of Pennichuck Water Works, 120 N.H. 562, 566 (1980). In that same case, the Supreme Court characterized the nature of the PUC's action in setting rates as "essentially a legislative function." As a result, tariff provisions are subject to the limitations of Part 1, Article 23 of the

New Hampshire Constitution prohibiting retrospective laws. Ibid. pp. 565-566.

Although this function is "legislative", the PUC is, nonetheless, an agency constituted within the executive branch of State government. The Commissioners are appointed by the Governor and Council and the rulemaking and adjudicatory proceedings of the Commission are governed by the State Administrative Procedure Act, RSA Chapter 541-A and due process requirements of the New Hampshire Constitution. See Appeal of Concord Steam Corp., 130 N.H. 422 (1988).

* * *

II. Description of PUC Rate Proceedings

* * *

The PUC's tariff filing rules are contained at New Hampshire Admin. Rules, PUC 1601.1-1603.09. These rules require the utility commencing a rate case to provide not less than thirty nor more than sixty days' notice to the Commission. The filing requirements for such a case require the utility essentially to file its direct case with the request for an increase in rates, together with numerous additional items. While the filing requirements are substantial, they are intended to avoid delay by requiring the utility to file at the outset those items which would almost certainly be obtained later in the case through discovery.

Once the utility makes the necessary filing, including revised tariff pages, the PUC must determine

within thirty days whether to allow the tariff change to become effective or to suspend the effectiveness of the tariff revision pending investigation by the Commission RSA 378:6. Obviously, unless the change is de minimis, the Commission takes the latter course. The Commission will then issue an Order of Notice setting the matter for a pre-hearing conference. At the pre-hearing conference, a procedural schedule is set and a first effort is undertaken at narrowing the issues for decision. Discovery generally proceeds in the form of data requests, which are interrogatories and requests for the production of documents. The number of data requests will vary depending on how complex and how controversial the issues of the case may be. In a straightforward case where the utility has fully complied with the tariff filing requirements, the number of data requests may be fairly limited. However, the number of data requests can be substantial. For instance, in the pending rate proceeding involving New England Telephone and Telegraph Company, DR 89-010, the number of data requests addressed to New England Telephone from the Commission staff and the other parties to the case has numbered in excess of 1,400. It is certainly safe to assume that the number of data requests in a case involving an adjudication of the prudence of expenditures for Seabrook would generate a substantial amount of data requests.

The procedural schedule will call for the pre-filing of testimony by the participants in the proceeding including, in addition to the petitioning utility, intervenors and staff. The schedule may

also accommodate rebuttal testimony. Each instance of the filing of testimony will be followed by a period for discovery with respect to that testimony. One or more conferences among the parties and the Commission staff are generally held for the purpose of discussing the potential for settlement and at a minimum narrowing the issues to be litigated. Finally, hearings are held before the Commission. If there are matters which have been settled, those matters are presented for approval by the Commission. Matters which have not been settled or which are the subject of settlement agreements that are not approved by the Commission are adjudicated in the hearing process.

Under RSA 378:6, the Commission's final decision on permanent rates must be made within one year following the rate case filing, except in the instance of an addition to rate base which exceeds 50 percent of the utility's existing capital investment, in which case the decision must be rendered within 18 months. This decision can be appealed pursuant to RSA Chapter 541; there are no statutory time limit on action by the Supreme Court or by the PUC on remand.

Under RSA 378:27, the Commission is authorized to approve temporary rates pending the final decision. Generally, temporary rate orders allow for increases or decreases with respect to items which appear from a preliminary review of the rate case filing to be likely to be allowed in any event. If the rate increase allowed in the permanent rate order at the end of the case provides for an increase in excess of what has been

allowed in temporary rates, the utility is permitted to recoup the difference between what it would have charged had it had rates during the temporary rate period been set at the permanent rate level and what was actually charged. This amount is normally collected over time in the form of a surcharge. Similarly, if the permanent rate order results in rates that are lower than the temporary rates, the difference in levels for the period of the temporary rates must be refunded by the utility to customers in the manner directed by the Commission.

If temporary rates are not allowed, the utility is permitted to place the entire amount of the rate increase into effect under bond six months after the originally proposed effective date of the tariff pursuant to RSA 378:6. If the rate increase allowed in a permanent rate order is less than this full amount, the difference between the amount collected under bond and the amount which would have been recovered at the permanent rate level must be refunded to customers.

III. The Ratemaking Formula

A. In General

The basic ratemaking formula has been described by the New Hampshire Supreme Court in the case of Appeal of Conservation Law Foundation, 127 N.H. 633-648 (1986). Basically, the utility is permitted to earn a reasonable rate of return on amounts prudently expended for property used and useful in providing service to the public after allowed expenses. This amount is the "revenue requirement" of the public utility.

The determination of the revenue requirement is made by examining the financial performance of the utility during a historical period and extrapolating therefrom the likely future financial performance of the utility. The historical period selected is called "test year." The Commission will examine the expenses incurred during that test year, the amount invested in capitalized assets (the "rate base"), and the return earned by the utility. See Appeal of Public Service Company of new Hampshire, 130 N.H. 748, 758 (1988); New England Tel & Tel. Co. v. State, 113 N.H. 92, 95-96 (1973).

B. The "Rate Base"

Amounts included in rate base consist primarily of amounts invested in items of real and personal property used in the utility business less accumulated depreciation. For electric utilities, these items include primarily generating stations, substations, transmission lines, distribution lines and various office and other types of buildings used in providing electric service. With respect to items which are allowed to be included in rate base, the utility is permitted to receive a return "of" and "on" amounts invested in those assets. The return "of" the investment is provided in the form of an allowance of depreciation or amortization as an expense. The return "on" those items is provided through the allowance of the rate of return on the unamortized balance.

In addition to costs associated with physical property, certain expenditures

by the utility which warrant recovery over a period of longer than one year are capitalized and amortized over a longer period. The requirement to capitalize such amounts and the amortization periods may be prescribed within the Commission's Uniform System of Accounts or by specific Commission order.

The rate base will usually also include a working capital allowance to provide investors with a return on funds made available by the utility to pay expenses before revenues to cover such expenses are recovered from customers.

Whether an item will be permitted to be included in rate base will depend on whether and to what extent expenditures were "prudently incurred" and whether the resulting asset is "used and useful" in providing service to the public.

* * *

In measuring rate base, the New Hampshire PUC has generally used a rate base which is averaged over the entire test period as opposed to looking at account balances as they exist on any single date.

Because the nature of the process is to take a historical period and project from it future results, the PUC will also take into account certain known and measurable changes. Accordingly, if there have been substantial changes in the rate base which will definitely affect future financial results, these known and measurable changes may be reflected. The inclusion of such changes, however, is tempered by the "matching" requirement, namely, the requirement to

match expenses with revenues. Many times new investment will result in new revenues. Therefore, care is taken to make sure that the reflection of known and measurable changes does not have the effect of overstating or understating the likely effect of the change on ultimate operating income. See Appeal of Manchester Gas Co., 129 N.H. 800, 806 (1987).

The rate base is also adjusted to reflect certain deferred taxes. See Appeal of Public Service Company of New Hampshire, 130 N.H. 748, 757-760 (1988).

C. Expenses

The Commission will also look in detail at expenses which are included within the test year. Expenses will be excluded for ratemaking purposes where they have been imprudently incurred or where they are incurred for non-utility purposes or are otherwise unnecessary for the conduct of the company's utility business. Expense amounts will also be adjusted for known and measurable changes. New expenses which are likely to be experienced prospectively may be included as pro-forma adjustments to the test year expense amounts. Expenses which are not likely to recur will be correspondingly excluded.

Based upon the foregoing analysis, the Commission will determine a pro-forma rate base and the pro-forma expense level that will be used in determining the revenue requirement.

Generally, then, items included in test year expenses are recovered through

rates in current annual revenues. There is a recovery "of" these amounts, but because they are recovered currently, the ratemaking process does not provide a return "on" these amounts (other than indirectly to a certain extent through the working capital allowance). This is in contrast with rate base amounts which are recovered over a longer period with a return being provided on the unamortized balance.

E. Return

Next in the analysis is the determination of the allowed rate of return. The allowed rate of return allowed is required to be not less than the utility's cost of capital. The cost of debt capital is a matter which can be readily determined based upon the interest rate of the debt and the amortization of any issuance expenses, premium and discount. The same is substantially true for any preferred stock which the utility may have outstanding, the terms of which will be established by the utility's Articles of Incorporation. The more difficult matter is the determination of the cost of common equity. This determination will involve the testimony of experts. The Commission in recent years has generally followed a discounted cash flow analysis in determining the cost of common equity. The Commission may also consider the "risk methodologies. See Morin, Roger, Utilities Cost of Capital, Public Utility Reports, Inc., 1984; Gordon, Myron J., The Cost of Capital to a Public Utility, MSU Public Utility Studies, 1974; Kolbe, A Lawrence, et al. The Cost of Capital --- Estimating the Rate of

Return for Public Utilities, MIT Press, Cambridge, Mass. 1984; Philips, Charles F., Jr., The Regulation of Public Utilities, 2d Ed., Part II (Theory of Public Utility Regulation), Public Utility Reports, Inc., 1988. See also Appeal of Public Service Company of New Hampshire, 130 N.H. at 751-757.

Based on this analysis, the cost of each component of capital is determined and weighted in accordance with the proportion of that component to the total amount of capital. The Commission may also look at whether the utility's capital structure is appropriate. In doing so, the Commission will examine whether the capital structure provides the utility with sufficient strength to withstand potential economic adversity and to have access to the capital markets in order to raise the funds necessary to invest in plant necessary to meet the requirements of service to the public. The Commission may also look at the economic efficiency of the capital structure. Among the factors the Commission will consider are the costs savings which can result from debt capital through the deductibility for tax purposes of interest payments. However, the Commission will also consider the impact of the risks associated with leverage on the cost of debt and equity capital. Generally, the Commission will be looking to a capital structure which provides long-term strength for the utility and which is likely to produce the lowest overall cost of capital in the long run. In an appropriate case, the Commission may determine the allowed rate of return on the basis of an imputed capital structure rather than the actual capital structure recorded on the

utility's books of account. See, Appeal of Conservation Law Foundation, 127 N.H. at 635-636; New England Tel & Tel. Co. v. State, 98 N.H. 211, 220 (1953).

An additional factor which may be reflected in the return is an "attrition" allowance. This kind of an allowance is more traditionally included in an environment of high inflation, where the simple fact of inflation is likely to result in a failure of the utility to earn its allowed rate of return on a go-forward basis even if the utility preforms exactly as contemplated in the pro forma test year calculation. Other arguments with respect to potential attrition in specific areas and its ratemaking treatment may also be made.

F. Calculation of Required Increase

The Commission next compares the pro-forma net operating income of the utility for the test period with the amount which results from the multiplication of the rate base times the allowed percentage rate of return. If the pro-forma net operating income is less, the amount by which it is less is the "revenue deficiency" to be recovered through increased rates. If the utility is a private corporation required to pay income taxes, the deficiency will be grossed up for the amounts by which the rate increase will necessarily increase the expenses for federal and state income taxes (including the State franchise tax imposed under RSA 83-C). This deficiency, grossed up for the tax effect, is the amount of the required rate increase.

The Commission then determines the rate classes from which the increase will be collected in the manner described in more detail in the Prior Memorandum [filed by State of New Hampshire on March 8, 1988, Docket No. 337, at Court request discussing NHPUC regulation].

APPENDIX L

UNITED STATE BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

IN RE

PUBLIC SERVICE COMPANY OF
NEW HAMPSHIRE,

Debtor

CHAPTER 11
Case No.
88-0043

GENERAL FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE PLAN CONFIRMATION ISSUES

[EXTRACTS]

* * *

35. Harry Saxon, a holder of PSNH preferred stock, has filed an objection to confirmation alleging that the Plan unfairly discriminates against \$25 par value preferred shareholders when compared to the treatment of \$100 par value preferred shareholders. That objection is without merit. The Plan provides for payment to preferred shareholders on the basis of the par value of their stock, and disregards accrued but unpaid dividends. The fact that some

preferred shareholders are giving up more dividends than others, or that the market prices for preferred stock may not have reflected the differences in the par value, does not warrant a finding that the Plan dis-criminates against some shareholders. To the extent compromises were reached in the treatment of preferred shareholders, these compromises were reached and approved by the Equity Committee and overwhelmingly accepted by preferred shareholders. These compromises in fact were part of the "give ups" negotiated to allow value to get down to the common shareholder class as part of achieving a consensual plan of reorganization. The fact that similar treatment may lead to different rates of return for some shareholders does not change the fact that they are all treated similarly under the Plan. Mr. Saxon's Objection is hereby denied.

APPENDIX M

THIRD AMENDED DISCLOSURE STATEMENT OF NORTHEAST UTILITIES SERVICE COMPANY PURSUANT TO SECTION 1125 OF THE BANKRUPTCY CODE

[EXTRACTS]

II. INTRODUCTION

★ ★ ★

D. COMMITTEES

★ ★ ★

2. Equity Committee [p. 11]

As a result of the different priority of the Existing PSNH Preferred Stock, the Existing PSNH Common Stock and the Warrants, whose holders' interests are represented by the Equity Committee, the potential rights of the constituencies represented by the Equity Committee differ and may conflict. All of the current members of the Equity Committee are holders of Existing PSNH Preferred Stock except one, Martin Rochman, who holds only Existing PSNH

Common Stock and has voted against the Committee's position on the Plan. Certain members of the Committee are holders of both Existing PSNH Preferred Stock and Existing PSNH Common Stock. No members of the Equity Committee hold Warrants.

* * *

III. THE DEBTOR

* * *

J. EMPLOYEE SEVERANCE BENEFIT MODIFICATIONS

NU and PSNH have agreed to ask the Bankruptcy Court to approve a stipulation (the "Stipulation") that would modify certain of the employee benefit arrangements previously put in place by PSNH, subject to Bankruptcy Court approval, and which were subject to various objections before the Bankruptcy Court as originally proposed. References to PSNH in this discussion of the

Stipulation include references to Reorganized PSNH after the Effective Date. The Stipulation provides that the employment agreements previously entered into by PSNH with its five most senior managers would be amended to provide termination benefits of two times the employee's then effective annual salary (plus accumulated vacation) (the original employment arrangements with these persons provided for termination benefits for a period of three times such amounts); for a continuation of medical, dental and life insurance benefits for a period of two years following termination (the original agreements provided such benefits for three years); for two years' additional credit under the PSNH pension plan and excess benefit plan upon termination (the original agreements provided for three years' credit); and for the deletion of a provision that

would have obligated PSNH to make certain tax indemnity payments to such employees.

In addition, the Stipulation provides that the Special Severance Pay Plan put into place on September 13, 1989 (subject to approval of the Bankruptcy Court) for the benefit of 51 key employees of PSNH would be amended to provide: that a required relocation outside of PSNH's service territory within 18-months following a change in control of PSNH (such as the Effective Date) would be "good reason" for the resignation of a covered employee, entitling the employee to the benefit of the Special Severance Pay Plan upon such a resignation (the original Special Severance Plan provided that relocation beyond a twenty-mile radius of the employee's prior job site gave rise to "good reason" to resign); that severance

benefits under the Special Severance Pay Plan would be equal to 1 1/2 weeks' salary for each 6 months of service, with a minimum of one year's salary for all vice presidents, corporate secretary and corporate controller (the prior minimum was one and one-half year's salary), and a minimum of one year and a maximum of one and one-half years' salary for all other covered employees (the prior maximum was two years' salary); and added an early retirement benefit for covered employees with 20 years of service with PSNH who had reached their 55th birthday prior to the 90th day after Confirmation, and who elect to retire on or prior to such date.

The Stipulation also provides that the amendments to the PSNH Pension Plan adopted in September, 1989, would be canceled (those amendments had provided for an early retirement program for all

employees in the event of a change in control).

* * *

V. DESCRIPTION OF THE PLAN

* * *

C. CLASSIFICATION AND TREATMENT OF CLAIMS AND INTERESTS

[pp. 25]

* * *

12. Class 11 (Preferred Stock)

[pp. 32]

* * *

The following table sets forth the Equity Committee's estimate of the range of values of the distribution under the Plan to holders of Allowed Claims and Interests in Class 11 in several different scenarios. In each scenario, the "best case" is one in which the

Petition Date Amount of Allowed Claims in
 Classes 10 and 10A total \$857,400,000
 and the book value adjustment is a
 positive \$10,000,000, and the "worst
 case" is one in which the Petition Date
 Amount of Allowed Claims in Classes 10
 and 10A total \$900,000,000 and the book
 value adjustment is a negative
 \$10,000,000

	Total Estimated Value (a)	Percent of Total Par Value (b)	Percent Total Claims (c)
--	---------------------------------	---	--------------------------------

Seabrook Operating
 and Merger
 Occurs (d)

best case	\$337.0	104.9%	69.7%
worst case	\$325.2	101.2%	67.3%

Seabrook Operating
 and No Merger
 Occurs (d)

best case	\$326.1	101.5%	67.5%
worst case	\$314.3	97.8%	65.0%

Seabrook Canceled
 and Merger
 Occurs (e)

best case	\$209.5	62.5%	43.3%
worst case	\$155.2	48.3%	32.1%

Seabrook Canceled
and No Merger
Occurs(e)

best case	\$194.9	60.6%	40.3%
worst case	\$140.6	43.7%	29.1%

(a) Assumes value of Reorganized PSNH Common Stock if \$20.00 per share, value of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is \$200.

(b) Total par value of outstanding Preferred Stock is \$321.4 million.

(c) Total Preferred Stock claims are \$483.3 million, including par value of \$321.4 million and pre-Petition Date accrued and unpaid dividends of \$161.9 million.

(d) Assumes issuance of maximum potential principal amount of Series C Contingent Notes.

(e) Assumes Seabrook Unit No. 1 is

canceled prior to the Effective Date.

* * *

13. Class 12 (Common Stock)

* * *

	<u>Total</u>	<u>Estimated</u>
Seabrook Operating and Merger Occurs (c)	Estimated Value (a)	Value Per Share (b)
best case	\$163.5	\$3.88
worst case	\$112.7	\$2.67

Seabrook Operating
and No Merger Occurs (c)

best case	\$157.6	\$3.74
worst case	\$106.8	\$2.53

Seabrook Canceled
and Merger Occurs (d)

best case	\$ 41.0	\$0.97
worst case	\$ 32.7	\$0.78

Seabrook Canceled
and No Merger Occurs (d)

best case	\$ 38.8	\$0.92
worst case	\$ 30.5	\$0.72

(a) Assumes value of Reorganized PSNH
Common Stock is \$20.00 per share, value

of Contingent Notes is 122% of face (principal) amount, and value of each NU Warrant is \$2.00

(b) Based on 42,154,548 shares of Existing PSNH Common Stock outstanding.

(c) Assumes issuance of maximum potential principal amount of Series C Contingent Notes.

(d) Assumes Seabrook Unit No. 1 is canceled prior to the Effective Date.

* * *

VI ACCEPTANCE AND CONFIRMATION

[pp. 68 TO 70]

* * *

E. CONFIRMATION WITHOUT ACCEPTANCE BY ALL IMPAIRED CLASSES

[pp. 69 to 70]

* * *

If a class of equity security interests rejects the Plan, the Plan may still be confirmed so long as the Plan provides either that : (i) each holder of

an interest included in the rejecting class receive or retain on account of that claim property which has a value, as of the Effective Date, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, and the value of such interest; or (ii) the holder of any interest that is junior to the interests of such class will not receive or retain any property at all under the Plan on account of such junior interests.

NUSCO has requested in the Plan that if necessary the Plan be confirmed pursuant to Section 1129(b) of the Bankruptcy Code.

* * *

VII BEST INTERESTS

[pp. 70 to 74]

* * *

A. GENERAL RULES APPLICABLE TO A SEABROOK RATE CASE

As a regulated utility, PSNH has certain rights and responsibilities. It is obligated to provide safe and reliable service on a non-discriminatory basis to all who request service. It must also conform to regulations with respect to the provision of its services to the public and limit its charges to the rates approved by regulatory agencies, most importantly the NHPUC. On the other hand, PSNH and its investors are entitled under state and federal law to just and reasonable treatment, including a fair opportunity to earn a reasonable return on capital invested to serve the public. Regulatory agencies are not required to follow any specific regulatory approach, but the end result of regulation must be fair to investors as well as consumers.

And, while regulatory agencies are afforded a great deal of discretion, policies or practices that are clearly unreasonable and result in significant financial harm to a utility or its investors have been held to violate the due process protections of the United States Constitution.

Traditional ratemaking and current New Hampshire law would permit the NHPUC to determine whether to allow inclusion in rates of all or part of PSNH's investment in Seabrook, once Seabrook begins "actually provid[ing] service to consumers." N.H. Rev. Stat. Ann. 378:30-a (the anti-CWIP law). PSNH contends that this investment will be approximately \$2.9 billion at January 1, 1990, including \$1.6 billion in carrying costs.

The fixed rate increases provided in the Rate Plan are lower than the rates which PSNH contends it would be entitled

to collect under traditional ratemaking principles, once Seabrook is providing service to consumers and rate changes are authorized by the NHPUC. In effect, implementation of the Plan will result in recovery of \$1.4 billion, or approximately 50%, of the Seabrook investment.

B. MAJOR ISSUES PRESENTED BY SEABROOK IN RATE CASE

The extent to which the investment in Seabrook would be reflected in PSNH's rates following a Seabrook rate case would depend on the NHPUC's findings on three issues; the prudence of the Seabrook investment, the extent to which the investment in the facility is "used and useful", and avoidance of "rate shock".

1. Prudence.

Under New Hampshire law, only that portion of an investment that is

"prudently incurred" may be reflected in rates. An investment is "imprudent", and excluded from rates, to the extent that (i) it was "forseeably wasteful" based on information available to the utility at the time the investment was made or (ii) the cost is excessive due to imprudent construction management. The factual analysis associated with prudence determination is lengthy and complex, and the facts are subject to a variety of conclusions.

2. Used and Useful.

Investment in a facility may be recovered in rates only to the extent that the facility is "used and useful" to the utility franchise--in other words, that the facility is necessary and economic in meeting PSNH's requirements to provide adequate electric service to New Hampshire customers. The NHPUC has been accorded wide flexibility to apply

this principle as a means of sharing the excess capacity burden between investors and customers. In a Seabrook rate case, the NHPUC would be asked to determine what could reasonably be done with the Seabrook investment as of the time of the "used and useful" determination. Among other considerations, at issue could be whether and how long any portion of Seabrook power or capacity would be excess to the needs of PSNH's retail customers.

3. Affordability of Rates.

The NHPUC is given wide latitude to establish "just and reasonable" rates. As the New Hampshire Supreme Court has said, "[t]he traditional ratemaking process gives the commission flexibility to accommodate the legitimate interests of both customers and investors in responding to the extraordinary issues disclosed by [PSNH's Seabrook

investment]."
Appeal of Conservation Law Foundation, 127 N.H. 606, 648 (1986).
"There is substantial economic leverage to establish a rate level that will not be oppressive to consumers or the New Hampshire economy or which is unfair to stockholders. Id. at 644, quoting the NHPUC, Re Pub. Serv. Co. of N>H>, 66 PUR 4th 349, 423 (1985).

If a rate increase or series of increases is too high or comes too quickly, it might adversely affect the New Hampshire economy or adversely affect PSNH's markets for electricity by depressing demand or driving customers from the system, a phenomenon commonly referred to as "rate shock". It is likely that the NHPUC would not permit inclusion in rates of PSNH's entire Seabrook investment at one time, since to do so might require rate increases which would be too high or come too

quickly. Accordingly, PSNH would likely propose a rate moderation plan incorporating either or both of two ameliorative concepts: (i) one which would recognize a recovery of less than PSNH's full \$2.9 billion investment or (ii) a gradual increase in rates over a number of years, based on the rate increase "phase-in" concept included in the Rate Plan.

C. CONDUCT OF A RATE CASE

In a Seabrook rate case, as in any rate case, the burden of proof would be upon PSNH on all issues, including the extent to which its Seabrook investment was prudent and the extent to which the Seabrook facility is "used and useful". The NHPUC would have up to 18 months to decide the case and establish ne permanent rates. It is possible that the NHPUC could implement a temporary rate increase during the pendency of the case.

1
It is also possible that the NHPUC, in the exercise of its own discretion or at the Bankruptcy Court's request, could adopt expedited procedures that would very substantially reduce the time needed for its review. Substantial opposition to both temporary and permanent rate increases can be expected from other instrumentalities of the State and intervenor groups seeking to minimize the amount of Seabrook investment to be recognized for ratemaking purposes. It cannot be predicted how long a Seabrook rate case proceeding would actually test, whether or at what level temporary rate increases would be allowed during the pendency of the proceeding, or the extent to which the Seabrook investment would actually be recognized for ratemaking purposes as the result of such a proceeding.

D. POSSIBLE OUTCOME OF A SEABROOK RATE

CASE

1. Possibility of Full Recovery

Under traditional utility ratemaking as practiced by the NHPUC and the FERC, if Seabrook were to commence commercial operation PSNH could request that its full investment in Seabrook Unit No. 1 be reflected in rates as of the in-service date of the unit. Assuming that Seabrook began providing service to consumers January 1, 1990, the investment in Seabrook would be approximately \$2.9 billion, including nuclear fuel. Inclusion of \$2.9 billion in rate base on an average basis, assuming a recognized cost of capital which is lower than the currently allowed cost of capital, represents an overall rate base value of approximately \$3.4 billion. PSNH performed an analysis based on a December 31, 1988 test year that indicated that a rate increase equivalent to a one-time

increase of approximately 89% would be necessary to support such a \$2.9 billion addition.

PSNH has stated that it would seek recovery of \$1.8 billion of its Seabrook investment in a Seabrook rate case, assuming that Seabrook becomes operational in the early part of 1990.

2. Prudence of Seabrook Investment.

In a Seabrook rate case, PSNH would contend that its Seabrook investment was prudently incurred. In support of this position, it could point to several audits of the Seabrook project which, in general, found the project to have been managed prudently. For example, an audit conducted by an independent consultant selected by the NHPUC found that 93% of the Seabrook investment, at the time construction was completed in October of 1986, had been prudently incurred. The audit findings, however, have not been

adopted by the NHPUC, and very likely would be contested by various parties in a Seabrook rate case. It should also be noted that a prudence audit conducted for the CDPUC found that 25% of the Seabrook investment was imprudently incurred and should be disallowed.

3. Used and Useful Nature of Seabrook.

Under New Hampshire's anti-CWIP statute, PSNH's Seabrook investment may not be reflected in rates until the plant is actually providing service to consumers, which PSNH believes will occur when Seabrook starts supplying net electrical output to the NEPOOL grid. This could be achieved as early as two weeks after Seabrook receives its full power authorization. However, the statutory phrase "actually providing service to consumers" has not previously been applied and may be subject to an interpretation that would require

additional conditions to be met.

PSNH believes Seabrook's operation will enhance the reliability of PSNH's service to its customers by adding capacity necessary to meet the growing demand for electricity in its service territory, as well as enhancing NEPOOL reliability by adding needed capacity to the New England region. Currently, PSNH is purchasing approximately 350 MW to service that demand and meet its NEPOOL obligations through short-term purchases from sources which may not continue to be available. Even with Seabrook on line, forecasted amounts of surplus capacity are relatively small and would last only through 1993, assuming a 2.3% growth rate. Factors such as higher growth rates or a delay in Phase II of the Hydro Quebec interconnection could cause PSNH to be without this surplus at an even earlier period. The "used and useful"

issue, however, would be a matter of contention in a rate proceeding, and PSNH's conclusion would be subject to challenge as to both the need for and cost of Seabrook capacity.

4. Affordable Rate Levels.

A study completed in early 1989 for PSNH by outside economic consultants Bower Rohr & Associates indicates that a one-time nominal rate increase that averages 31% and varies among customer classes with annual increases thereafter at the rate of inflation is affordable, that is, both bearable and feasible. The consultants also reviewed a rate plan consisting of five annual step increases with an aggregate rate level effect somewhat less than the 31% one-time increase, and increases under conventional rate making thereafter, and found that this lower level of aggregate increase was also bearable and feasible.

The Bower Rohr & Associates study was in part based upon a review and assessment of related studies done by PSNH personnel and other consultants, which reached similar conclusions. The level of rate increases considered by these studies is significantly higher than the increases included in the Rate Agreement.

The studies included examinations of the price elasticity of demand for electric energy, the price and availability of alternative sources of energy, the possibility of industrial customers relocation or use of cogeneration facilities, and the extent to which higher electric rates might result in the establishment of municipal electric departments to serve their residents directly. Also considered were the effects that higher electric rates might have on the economic and social well-being of customers.

The conclusions reached in PSNH's studies were that while there would be some social and economic effects and some loss of sales to PSNH from the increases under review, the higher rates would not cause undue social disruption or economic hardship, or shrinkage in size of PSNH as an energy provider. The issue of elasticity of demand, however, is complex, and studies conducted by others would likely be offered to show that the customer response to such increases would be more severe.

5. Recent Seabrook Settlements

There have been two recent rate case settlements in other jurisdictions in which the recovery of the Seabrook investment of other utilities was determined. In one case, the New England Electric System was granted recovery of \$326 million of its \$543 million investment in Seabrook (60%) if the plant

operates and \$282 million (52%) if the plant does not operate. In the second case, United Illuminating was allowed recovery of \$640 million of its \$1.182 billion investment in Seabrook (52%). Each of the utilities had also been permitted to recover a portion of its Seabrook related costs during construction. If the prior cost recovery is considered, the percentage of total investment recovered would be higher. The settlements also involved the resolution of non-Seabrook issues which resulted in additional benefits to the utilities.

It is not possible, however, to know for certain whether the results of a Seabrook rate case would be more or less favorable than the recent settlements.

6. Comparative Advantages of Proposed Rate Plans and a Seabrook Rate Case.

PSNH has indicated that in a Seabrook rate case it would seek recovery

of \$1.8 billion of its investment in Seabrook, approximately \$400 million more than would be realized for the benefit of creditors and shareholders under the Rate Agreement. There can be no assurance, however, that PSNH would be successful in recovering \$1.8 billion of its Seabrook investment in a rate case, nor can it be known for certain what level of recovery the NHPUC actually would approve. It is reasonable to assume that a Seabrook rate case would be vigorously contested and that various parties would urge recovery of a lesser amount.

There are numerous risks presented by a rate case that would be avoided under the Rate Agreement. For example, implementation of the Rate Agreement would mean that PSNH would achieve rate increases, and corresponding values, regardless of whether or when Seabrook

runs, and regardless of any of the risks attendant to a litigated rate case.

Implementation of the Rate Agreement also means that PSNH is assured of certain rate increases throughout the term of the Rate Agreement, rather than being exposed to the risk that subsequent proceedings might minimize whatever gains were achieved in a Seabrook rate case. In addition, the Rate Agreement allows the Reorganization Case to be resolved sooner, thus allowing distribution of recoveries sooner than would be likely if a fully contested Seabrook rate case were pursued instead.

For the foregoing reasons, NUSCO believes that the Plan is in the best interests of creditors and stockholders when compared with this alternative.

* * *

EXHIBIT C
[to the Disclosure Statement]

FORM 10-K
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
For the fiscal year ended
December 31, 1988

[EXTRACTS]

* * *

Item 8: FINANCIAL STATEMENTS AND
SUPPLEMENTARY DATA

* * *

Notes to Financial Statements

* * *

3. Change in Seabrook Accounting and
Losses on Generating Projects

The Company's financial difficulties are directly related to the magnitude of its investment in Seabrook and to the Company's inability to base its rates upon the cost of this project prior to its operation (currently assumed to be January 1, 1990 for financial planning purposes). The Company determined that, should the Seabrook Plant be permitted to become operational, political and

competitive pressures would not permit the Company to recover the recorded cost of its investment in accordance with traditional utility ratemaking practices. Accordingly, in 1987 the Company changes its method of accounting for its investment in Seabrook to eliminate AFUDC from capitalized costs and to recognized capitalized interest and associated income tax effects. This change in method of accounting effectively restated the cost basis of Seabrook to eliminate the previously assumed effects of regulation. the 1987 financial statements reflect this change as if it had occurred at January 1, 1987.

In 1988 the Financial Accounting Standards Board issued definitive guidance to be followed in situations where the recorded cost of investments would not be recovered through traditional ratemaking practices. While

the new accounting standard would provide for treatment of the event as an extraordinary item, rather than as a change in accounting principle, the overall result of the application of the new standard would not produce a result materially different than the accounting followed by the Company in 1987, and accordingly, no restatement of that accounting has been made. The new standard would not require the elimination of the previously assumed effects of regulation and restatement of assets, unless, as was the case for the cost basis of Seabrook, there was impairment.

Management has determined that further cost capitalization in connection with Seabrook would not be prudent and therefore ceased capitalizing such costs effective December 31, 1987. Accordingly, a loss of \$212.0 million was recognized

in 1987 associated with estimated remaining costs to be incurred prior to an assumed operating date of January 1, 1990. The loss provision of \$212.0 million included interest of \$70 million relating principally to interest on secured debt. It did not include a provision for interest on unsecured debt after January 28, 1988. During 1988 \$109.5 million was charged to the accrual, including the \$47.5 million of capitalized interest associated with the Seabrook investment. The Company has not changed Seabrook's assumed operational date for financial forecast purposes of January 1, 1990. If there are delays in that date, Seabrook costs, approximately \$8 million of each month of delay will have to be accrued by the Company when the delay becomes probable.

* * *

Item 12. SECURITY OWNERSHIP OF CERTAIN
BENEFICIAL OWNERS AND MANAGEMENT

Reference should be made to the information furnished in the tabular listing of Directors of the Company under "Item 10. Directors and Executive Officers of the Registrant" for information as to the shares of stock owned by Directors of the Company.

To the knowledge of the Directors, no person owns beneficially as much as 5% of the outstanding shares of Preferred Stock, \$25 par value. The following table sets forth information with respect to shares of Common Stock and Preferred Stock, \$100 par value, owned beneficially as of March 16, 1989 by all persons who are known by the Directors to own beneficially more than 5% of the outstanding shares of either Common Stock or Preferred Stock, \$100 par value.

Preferred Stock, \$100 par value.

The Prudential Insurance Company of America	90,000 Record and Beneficial	14.64%
[address omitted]		

The Mutual Benefit Life Insurance Company	56,400 Record and Beneficial	9.18%
[address omitted]		

Common Stock, \$5 par value

The Manufactures Life Insurance Company	3,467,025 Beneficial	8.53%(1)
[address omitted]		

Donald Smith & Co., Inc.	2,730,275(2)	7.34%
[address omitted]		

(1) According to a Schedule 13G dated February 6, 1985 filed by the Manufacturers Life Insurance Company, it beneficially owns currently exercisable warrants to purchase 3,467,025 shares of common stock, or 8.5% of the outstanding shares of Common Stock, assuming exercise by Manufacturers of the warrants and that no other warrants are exercised.

(2) According to a Schedule 13G dated February 6, 1989 filed by Donald Smith & Co. Inc. an investment management firm, the firm owns 2,730,275 shares of Common Stock on behalf of certain beneficial owners:

The following table sets forth information as of March 16, 1989, with respect to the number of shares of Preferred Stock and Common Stock and number of warrants owned beneficially by all Directors and officers of the Company as a group:

Class	Number of Shares or Warrants Outstanding	Percent of Class
Common Stock	18,222	0.05%
Warrants to Purchase Common	8,000	0.04
Preferred Stock \$100 par value	112	0.01
Preferred Stock \$25 par value	2,320	0.02

APPENDIX N
UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re:

Public Service Company Bankruptcy Case No. 88-00043
of New Hampshire VOLUME I

Manchester, N. H.

April 4, 1990

Wednesday, 9:30 A.M.

HEARING RE: CONFIRMATION HEARING
REGARDING THE CHAPTER 11 PLAN OF
REORGANIZATION

BEFORE; The Honorable James E. Yacos,
Bankruptcy Judge.

* * *

[pp. 132 to 158]

MR. SAXON: Your Honor, my name is Harry Saxon, I reside in Lakewood, New Jersey. I am a private investor and have been a stockholder in Public Service of New Hampshire since 1979. My current holdings in Public Service of New Hampshire include 1100 shares of \$25 par value Preferred E and 519 shares of \$25 par value Preferred C. I became involved

in this after receiving the voluminous Third Amended Plan of Reorganization by Northeast Utilities.

THE COURT: If you will excuse me one moment.

MR. SAXON: Yes

THE COURT: Go ahead, counsel, or Mr. Saxon.

MR. SAXON: Yes, Your Honor.

THE COURT: You have been an equity holder, a stockholder since when?

MR. SAXON: 1979, that was originally common stock and I began purchasing the preferred in 1984. I believe it was 1984, and I currently, I had a greater position at one time but currently own 1619 shares.

THE COURT: You own 1600 of what?

MR. SAXON: I own 1100 of the \$25 par value Preferred E and 519 of the \$25 par value Preferred C.

THE COURT: You own any common stock?

MR. SAXON: Not at this time.

THE COURT: Did you own any at the time the case was filed in January of 1988?

MR. SAXON: When I received the copy, in fact, I received 6 copies because of my various holdings of the voluminous Plan of Reorganization. I became incensed at what I considered the unfairness and the injustice involved in the Equity Committee's decision to base their distribution solely on par value and I voiced 2 objections to this Court.

The first one was based on my thoughts that it was unfair, unjust, and then after getting more information about the constitution of the Equity Committee, I realized that the Equity Committee itself or I believe the Equity Committee itself was not representative of the vast majority of shares of preferred shareholders.

THE COURT: Let me get this straight, you own preferred 100 preferred and 25 preferred?

MR. SAXON: I own one, \$25 par preferred.

THE COURT: All these shares are \$25.

MR. SAXON: YES

THE COURT: All right, and your objection, I gather, is that the Equity Committee had more members with the higher preferred stock?

MR. SAXON: Well, not just more but it was packed with hundred dollar par value preferred shareholders or represented.

MR. BERMAN: Object to that characterization.

THE COURT: I understand, you will be able to respond. What I'm trying to get clear is what's the nature of the objection with regard to the present plan? The committee was selected by the U.S.

Trustee in early 1988. You realize this Court does not select the committee members?

MR. SAXON: I do realize that, Your Honor.

THE COURT: No one until this hearing and I think when Mr. Richards first raised an issue in late December has ever challenged the makeup of the Equity Committee, so what is it you're asking me to do, deny confirmation of the plan because the committee is not representative?

MR. SAXON: I ask you for denial of confirmation of the plan.

THE COURT: I will do one of 2 things this week or next week or whenever I do it is to confirm the plan or deny the confirmation of the plan, those are my choices.

MR. SAXON: I would like the Court to see fit to redirect the allocation,

whatever was allocated to preferred shareholders in a more equitable manner.

THE COURT: And how do you read that distribution now and how would you think it would be more equitable?

MR. SAXON: Your Honor, I have a formal response of Mr. Berman and Mr. Nolan to my objections and I would like to reply to that, and in this response, I also have suggestions for a fair distribution of the stocks.

THE COURT: Well, that raises a problem, although it can be waived, and that is you were supposed to reply to those responses before this hearing.

MR. SAXON: I voiced my objections.

MR. NOLAN: I waive it, Your Honor. —
He can speak.

THE COURT: Is it waived?

MR. NOLAN: Yes.

MR. SAXON: They cannot indicate anybody.

THE COURT: Equity Committee waive?

MR. BERMAN: Yes, your Honor.

THE COURT: All right, then I will receive your response. They have waived any objection to the procedure.

MR. SAXON: Mr. Berman, Attorney for the Official Committee of the Equity Security Holders.

THE COURT: You want to file that with the Court?

MR. SAXON: I will file it when I have read it.

THE COURT: You don't have one for me to look at? You give be the original and you can look at a copy. I will have it filed. Stephen, file it and docket it as supplemental objection by Saxon.

MR. NOLAN: Response technically, reply?

THE COURT: Well, it's really a reply. Docket it as supplemental reply by Saxon.

MR. SAXON: Mr. Berman, in a footnote on Page 2 of his response to my objection, dismisses my claims by repetition of his claim that my contentions are groundless but offers no real justification for the position, merely by repeating, you know, it's fair, it's fair.

THE COURT: Well, I would suspect this has something to do with the fact that the 100 preferred stock had more rights than the 25 preferred. You don't accept that? What is the contention? Maybe I'll hear Mr. Berman explain what their position is.

MR. SAXON: The contention is that the committee did not properly represent the vast number of preferred shareholders, preferred shares. I shall be precise. There are 13 different classes of preferred, 6 of \$100 par value and 7 of \$25 par value.

THE COURT: You're not a lawyer, are you?

MR. SAXON: No, I'm not.

THE COURT: I'll explain something about the procedure here that I think you need to understand. What I have before me is not the committee per se. I have before me a question about the plan and whether the treatment under the plan is or is not in accordance with the Bankruptcy Code. Now, if there's something improper about the plan treatment, you will tell me that but the fact that the committee is or is not made up one way or another is not an issue directly before me.

No one challenged the committee prior to this plan going out, prior to the Disclosure Statements being heard and I understand that you now want me to do something about the committees.

MR. SAXON: No, I don't, Your Honor.

THE COURT: All right, then, regardless of how it happened, what is unfair, improper about the plan, that's the focus that I need?

MR. SAXON: All right, maybe I will have to skip part of this. Mr. Berman argues that the voting results verify his contentions that the vast majority of preferred shareholders considers the plan fair and that is absurd. Only 10 percent of the \$25 par value preferred shareholders voted. It is reasonable to assume that a like percentage of \$100 par value preferred would vote if the plan were fair, but over 56 percent of the \$100 par value preferred shares were voted. This statistically significant difference probably stems from the fact that the \$100 par value were privileged shareholders.

THE COURT: You say 10 percent of them actually voted?

MR. SAXON: That's right.

THE COURT: And the others?

MR. SAXON: 56 percent.

THE COURT: Of the.

MR. SAXON: \$100 par value.

THE COURT: 50 percent?

MR. SAXON: 56 percent of the \$100
par value.

THE COURT: And how much of the 25.

MR. SAXON: 10.

MR. NOLAN: Well, I'm going to object
if Your Honor is taking this as the
truth.

THE COURT: Wouldn't it appear by
arithmetic in the Disclosure Statement?

MR. NOLAN: That's not the vote. I
have the vote.

THE COURT: The numbers you have
certified compared to the outstanding
shares?

MR. NOLAN: Exactly.

THE COURT: You're saying it's

different than 10 percent?

MR. NOLAN: That's correct.

THE COURT: You can put that in the record and I'll consider it.

MR. SAXON: I have taken the figures from Mr. Berman's letter to me quoting the actual number.

THE COURT: All right, that is disputed and the proponents will direct my attention to something else.

MR. SAXON: I personally know \$25 par value voted in favor of the plan upon receipt of their forms but I could find no one who had read the reorganizational plan or really knew what the plan offered, and upon a detailed explanation, some were infuriated and wished they had voted against the plan. Some stockholders were so disgusted, they voted for the plan to simplify the resolution of the bankruptcy.

THE COURT: The important point is

that there has to be some procedure to get a vote to get the plan before the Court to get confirmation, if it's appropriate, and get the company out of the Courts. That's what reorganization is about. Many people have second thoughts throughout this process.

MR. SAXON: But Mr. Berman interprets the voting results as a clear indication of fairness.

THE COURT: Your main point is I shouldn't consider that such overwhelming support.

MR. SAXON: That's right.

THE COURT: All right, I'll take your comments into account.

MR. SAXON: If only 12.2 percent voted to accept the plan, how can Mr. Berman logically interpret this to mean that, I quote, "The vast majority of preferred shareholders consider the plan fair."? I will concede the fact that,

based on the voting record, the \$100 preferred shareholders do consider the plan good for them.

THE COURT: You're aware under the Bankruptcy Law, it's the parties that actually act that get to vote.

MR. SAXON: I'm aware after that.

THE COURT: And those that do not act are voting in a way, in effect, saying we don't care.

MR. SAXON: Both Mr. Berman and Mr. Nolan elaborated on classification and treatment of classes which I have not and do not question. I have not and do not object to the total allocation for distribution to the preferred shareholders, that is not my argument. Neither attorney addresses the fact that equal treatment accorded preferred shareholders under the Joint Plan would be more equitable if the amount available for distribution to preferred

shareholders be distributed to preferred shareholders be distributed based upon call price, which approximates par value, or a combination of par value plus accrued dividends such as the recommendation of Public Service of New Hampshire in their Plan of Reorganization dated December 27, 1988.

Either of the above methods would, in my opinion, be less discriminatory to Class 11 preferred shareholders than the current plan which is based solely on par value.

THE COURT: Are you reading from this document you just handed up?

MR. SAXON: Yes.

THE COURT: Where did that appear?

MR. SAXON: It's the center of Page 3.

THE COURT: Just a minute.

MR. SAXON: Mr. Nolan in his response on the bottom of page 4, in your

letter to me, cites pari passu in the sharing of bankruptcy recoveries, then says each holder within Class 11 is receiving the same treatment. This is misleading and deceptive.

To illustrate, in this bankruptcy, under Class 10, there are 14 $\frac{3}{8}$ percent debentures due 1991 and 15 percent debentures due 2003. Although they are in the same class and have identical par value, the final distribution to the 15 percent debenture holders, formulated by the Creditors Committee, will be slightly more than the distribution given the 14 $\frac{3}{8}$ percent debenture holders. If this distribution is proper under Class 10, I don't see any reason why it cannot be applicable under Class 11 to preferred shareholders.

In summary, 78 percent of all preferred shares were not represented on the Equity Committee. 83 percent of the

\$25 par value preferred shares had not representation on the Equity Committee, yet a hundred percent of the \$100 par value preferred shares were fully represented and even the alternate on the Equity Committee represent \$100 par value preferred share interest.

These facts verify the inequity in the makeup of the equity committee. The Equity Committee's recommendation that distribution be based solely on par value obviously discriminate against \$25 par value preferred shareholders.

THE COURT: Say that again. Is that in here?

MR. SAXON: Yes, that is the conclusion on the last page, Page 4.

THE COURT: Where is that?

MR. SAXON: The last page.

THE COURT: Where on the page?

MR. SAXON: About 6 lines down, 7 lines down.

THE COURT: All right.

MR. SAXON: The Equity Committee's recommendation that distribution be based solely on par value obviously discriminates against \$25 par value shareholders and that is demonstrated by the voting results. Less than 1 percent of \$100 par value preferred shares voting were voted to reject the plan, and over 8 percent of the \$25 par value preferred share were voted to reject the plan.

THE COURT: All right, I think I understand your contentions. I will hear the responses and then you will have a chance to respond.

MR. SAXON: Thank you. I thank the Court for the opportunity to voice my objection and trust that your final decision of this matter will sustain the valid objection I have raised.

THE COURT: All right, I will consider your comments and I'll hear any

response. Go ahead, Mr. Nolan.

MR. NOLAN: If Your Honor please, I don't think it's clear but I did not hear Mr. Saxon say that he wanted Your Honor to deny confirmation of the plan. I think you asked him that at one point, it may have gotten lost, and I think he said he did not want that result. His complaint, Your Honor, is with the split in Class 11 between the \$100 preferred and the 25.

If I could refer Your Honor again to the Certificate of Voting which is Docket No. 3431, there is an Affidavit in that submission from the First National Bank of Boston and that sets forth the tallies separately calculated for the \$100 par value and the \$25 par value. Mr. Saxon's statements concerning the numbers of voters in the \$25 par value class is in error and let me explain why.

Although the tally from the First

National Bank of Boston states 1,002,483 voted from the \$25 par value, in accordance with the By-Laws of PSNH, there actually were 4 times that number of shares voted. The By-Laws of PSNH provide for one-quarter of a vote for \$25 par value and a full vote for the \$100 par value, so that, of course, would be a logical result, I think, under the Bankruptcy Code as well and no matter, for the purpose of determining whether or not the vote was accepted, its immaterial because of the percentages whether you count them one vote for the 25's and one for the 100's.

THE COURT: I take it he's not challenging acceptance, he's referencing the argument that that overwhelming approval by this class is not to be taken at face value because of his calculations.

MR. NOLAN: He calculated that only

10 percent of the \$25 par value shares voted. Its 42 percent, Your Honor, and of that 42 percent, 91.97 percent voted in favor of the plan and a 42 percent turnout I think is reasonably good as bankruptcy cases go.

With respect to the method for distribution of Class 11, Your Honor, that is based on par value and I think it's expected that if everything goes well, the holders of Class 11 will get their par value back and I think we are really fighting over nothing because everyone, I believe, in this case is being treated the same way.

They are all going to get their par value and I could see if there was going to be something more than par value, where there would be disparity based on a different rate but that is not the case here and I think under the law, the classification of both sets of preferred

in Class 11 is proper. Once they are in the same class, they have to get the same treatment, the treatment is reasonable and I think under the Bankruptcy Code, that means that Mr. Saxon's objection should be overruled.

THE COURT: Well, he indicated that the debtor's original 1988 plan provided for a different distribution on a different basis relating to call prices par value plus accrued dividend, what is your response?

MR. NOLAN: Your Honor, there were 4 plans and I lost track of how many variations of those plans there were, how many different amendments and that's not the plan that's being offered.

THE COURT: I understand, and I'll ask the Equity Committee why they agreed to this plan in that context. Do you have any other comments?

MR. NOLAN: No, sir.

THE COURT: All right, the Equity Committee?

MR. BERMAN: Your Honor, the primary rationale was one of the major give-ups here by the preferred shareholders was all the pre-petition accrued dividends that flowed down to the benefit of the common and, accordingly, the distribution under the plan was designed to try to get everyone at par value and treat everyone the same in that fashion, and we believe it has been voted on favorably, I think over 92 percent, and it's fair and reasonable.

THE COURT: In other words, there was a deliberate decision made to change from the debtor's original distribution to par value so that additional value could get down to common?

MR. BERMAN: Yes.

MR. RICHARDS: Your Honor, can I be heard on this?

THE COURT: You want to object to anything that gets more down to common, you can't be heard on that, sir, that's not relevant, but I will hear Mr. Saxon back if he has any additional comments.

MR. SAXON: Well, it seemed to me quite clear that the Equity Committee itself was prejudicial in their proposed plan for distribution of the funds and I think I proved that.

THE COURT: They represented both preferred and common.

MR. SAXON: I know that there was only one representative for the common.

THE COURT: There's only one committee. Nobody asked for a separate committee for the common.

MR. SAXON: I am aware of that and that's not my contention.

THE COURT: Until the Disclosure Statement Hearings were closed.

MR. SAXON: It's the makeup of the

preferred representatives of the Equity Committee that disturbs me.

THE COURT: I understand all that but their explanation is not uncommon in a Consensual Plan or allegedly a Consensual Plan in which you give up something to lower classes so that they don't force litigation and endless delay, and maybe you don't come out as good as giving up something now, that's basically, I gather, what happened.

MR. SAXON: But even here now, Mr. Berman still does not explain why another method of distribution of the final allotment cannot be made.

THE COURT: Because that isn't the bargain, this is not the bargain. You understand this is a bargaining situation?

MR. SAXON: Yes.

THE COURT: Common could say, we don't accept this plan, we want to

litigate until 2,001 and we'll risk everything and then we lose our shirts and maybe we'll gain greatly, but if you tell them you will get nothing, they will risk their shirts.

MR. SAXON: But I'm not asking for anyone to get less but certainly the minority members of the preferred shareholders, they would get a slight amount less.

THE COURT: You're within the preferred?

MR. SAXON: Within the preferred.

THE COURT: This par thing applies to both, does it not?

MR. BERMAN: Yes, Your Honor.

MR. NOLAN: He's not asking that the plan not be confirmed, he's asking, I believe, that there be a reconfiguration of the distribution in Class 11, is that right?

MR. SAXON: Yes.

THE COURT: I cannot do that in this hearing. I can deny confirmation because it doesn't comply with the law and maybe if I do that, maybe people will negotiate it differently but maybe they don't. What I do have before me is a question of confirmation or not confirmation. You don't like that feature of the plan, you think it could have been done otherwise.

MR. SAXON: I see no reason why it shouldn't, this was done in Class 10.

THE COURT: All right, well, I'll review your letter and then the plan and Disclosure Statement again before I rule on this matter.

MR. SAXON: I understand, Your Honor, that the final decision rests with this Court, you, and that if you wish, you could rule in my favor and say that the amount that was allocated for preferred shareholders be distributed in a more equitable manner to the \$25 par value

preferred shareholders.

THE COURT: All right, Mr. Berman, why don't I just do that? It will be a lot simpler.

MR. BERMAN: It's already been voted on, Your Honor.

THE COURT: If I did it, what would happen?

MR. BERMAN: We would go back to square 1.

THE COURT: We would have to have a new vote. You can't take away from people who voted on this plan something and say you voted for this plan but when it came to confirmation, we changed it and took something away from you and didn't give you a chance to vote for it. You can't do that. You want to take something from the 100 and give it to the 25?

MR. SAXON: Yes.

THE COURT: All right, they voted on a different plan. How do you think I can

just do that because you think it will be better and you would get more?

MR. SAXON: Well, in the case of the warrant holders where they voted to reject it, don't you have the power to say well?

THE COURT: Because there is nobody below the warrant holders, for one reason. All right, well, look, I will consider your comments. I really don't know that I have much choice other than confirm or not confirm but I will review your comments.

MR. SAXON: Thank you, Your Honor.

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW HAMPSHIRE

In re:

Public Service Company Bankruptcy Case No.
of New Hampshire 88-00043
 VOLUME V

Manchester, N. H.

April 12, 1990

Thursday, 9:30 A.M.

HEARING RE: CONFIRMATION HEARING
REGARDING THE CHAPTER 11 PLAN OF
REORGANIZATION

BEFORE; The Honorable James E. Yacos,
Bankruptcy Judge.

* * *

[pages 152-155]

THE COURT: All right, I'll rule on the admissibility of these exhibits. The Court has before it exhibits, Richards Exhibits 107 through 119 which have been marked for identification and there has been considerable inquiry and voir dire on the foundation basis for the admission of these exhibits as evidentiary exhibits.

In my judgment, these exhibits are a form of argument but are not evidence as such and for that reason, I will sustain the objection.

The inquiry has indicated here that the witness has approximated the NU Plan to his own liking and for his own purposes and has come up with, for the benchmark exhibit which is 111, a picture of the NU Plan that involves many of his own assumptions and not the assumptions underlying the NU Plan.

That, in my judgement, distorts, eliminates the reliability of the other exhibits for the purposes offered.

Beyond that, with regard to the charts themselves, I think they are subject to the same weakness since they are based upon the underlying data exhibits, the printouts and the computer returns, but more importantly, they are misleading in that the interesting

information that a PUC Commission would be interested in a litigated rate case I think is off these charts.

It is in the future since it's obvious to me from everything I have heard that the whole approach by this objector or these objectors is to backload the recovery of the Seabrook costs in the future, so I think the charts, if they are to be meaningful in terms of evaluating the litigated rate case should show the whole picture, that is what would it look like 10 years out and not only 10 years out but 15 years out, 20 years out, maybe 40 years out.

The Examiner brought that point out pretty clearly, and I believe that in that sense, these charts are not appropriate.

Now, as evidence, in terms of argument, I will give these objectors as well as the proponents a chance after

they conclude the evidence in this case to argue, as they will, from this record and any assumptions or inferences that you can make, including the concept of alternative depreciation methods or alternative accounting methods.

That is my ruling on these exhibits. They will not be received in evidence. So ordered.

We'll take a 10 minute recess.

(Thereupon, a 10-minute recess was taken, after which the following proceedings were had:)

THE COURT: I want to state for the record an additional ground of denial of those exhibits. This hearing is a hearing on approval, confirmation of a Plan of Reorganization which embodied within itself a compromise with regard to a litigated rate case.

In that context, it is essential to show the alternative available in

liquidation which would be the litigated rate case before the PUC. The exhibits proffered raise so many collateral issues as to the underlying data that it would appear to me that I would, in effect, be conducting a rate case were I to allow these to come in and allow the necessary cross examination in the development of the underlying data before I could give them any weight in that context, so for that reason as well, I don't believe it's appropriate to receive these as evidentiary exhibits for the purposes indicated.

As I indicated, the objectors can argue to this Court at the conclusion of the evidence what they believe might happen in a litigated rate case in terms of different theories and approaches in recovering the cost of Seabrook. So noted.

APPENDIX O

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF
NEW HAMPSHIRE

In re

PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE, a/k/a Chapter 11
"Public Service of Case No.
New Hampshire" 88-00043
"PSNH"
"New Hampshire Yankee"

Debtor

SECOND REPORT OF EXAMINER

July 28, 1989

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[EXTRACTS]

* * *

[P. 18]

I did not comment on the various provisions of the proposal, but indicated my belief that the value proposed [\$1.85 billion] was not sufficient to provide

the basis for a consensual plan, nor was it, in my view, a reasonable level of valuation. Northeast expressed confidence that its ability to pay cash to the creditors would gain their support and that it would be able to "cram down" the Equity. The plan called for full recovery for Secured Investors, 90% of the prepetition claims of the Unsecured Investors, mostly in cash, and \$165 million for the Equity, if they voted for a consensual plan and nothing if they opposed it.

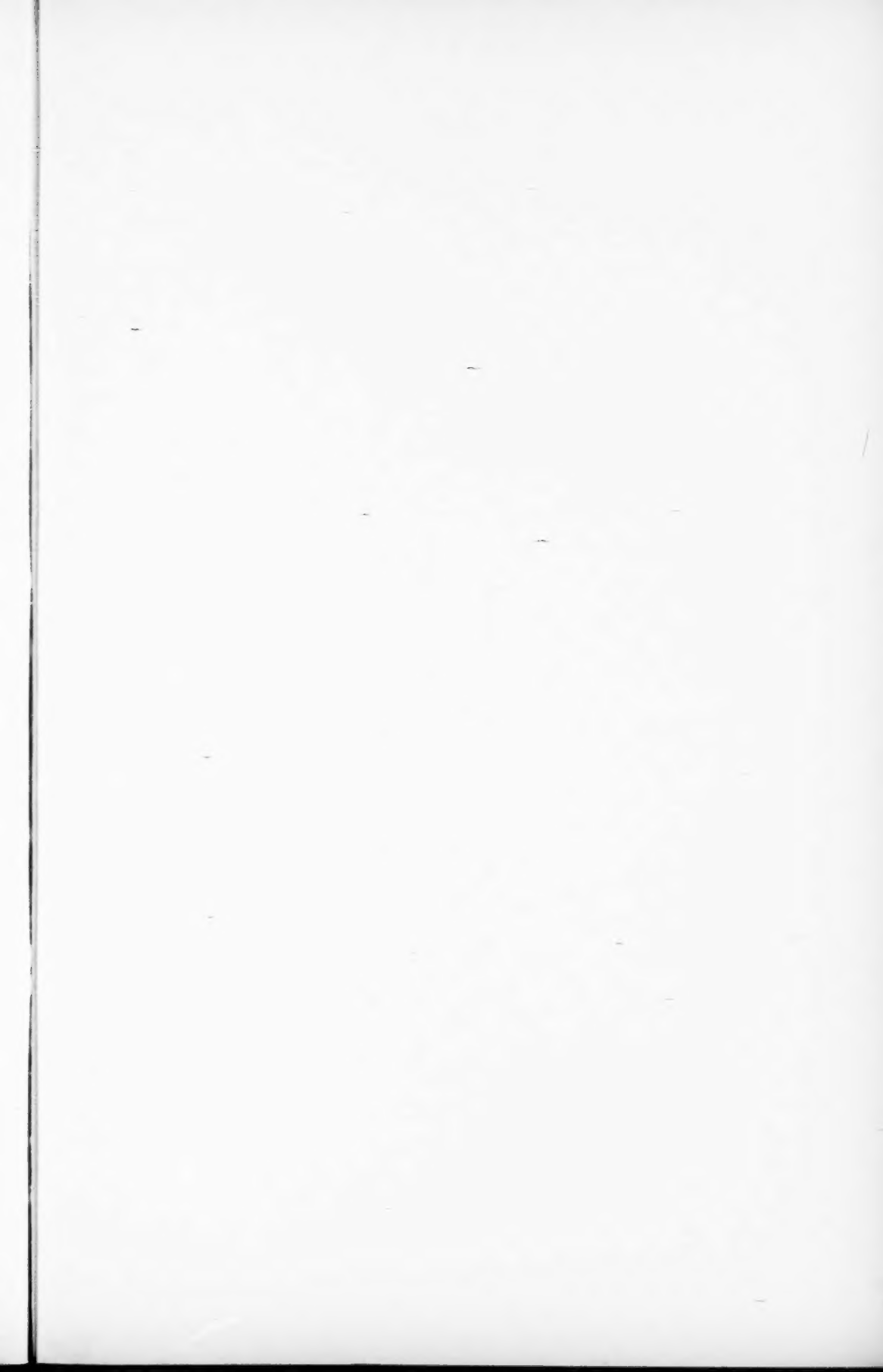
* * *

[p. 19]

The State representatives indicated that they were not contending that the proposed recovery [\$ 2.2 billion proposed by the Examiner] was outside the range of reasonableness from a regulatory point of view, but that in order for them to gain the public support of the State's

political leadership a proposal would have to represent an outcome that was more favorable than what might be expected to result from the regulatory process.

* * *



Supreme Court, U.S.
FILED

AUG 30 1991

OFFICE OF THE CLERK

No. 91-200

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

**ROBERT C. RICHARDS, EDWARD KAUFMAN
AND MARTIN ROCHMAN,**

Petitioners.

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

**BRIEF OF RESPONDENTS NORTHEAST UTILITIES
SERVICE COMPANY AND PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Does a claim by shareholders in a public utility company that they should be granted standing in state court to challenge a state regulatory decision despite their company's support for that decision present a federal question suitable for review by this Court?

LIST OF PARTIES

Respondents supplement the statement set forth by petitioners by stating that respondent Northeast Utilities Service Company is a wholly owned subsidiary of Northeast Utilities, a public utility holding company. Northeast Utilities Service Company has no subsidiaries. The following subsidiaries of Northeast Utilities have issued shares or debt securities to the public:

The Connecticut Light and Power Company
Holyoke Water Power Company
Western Massachusetts Electric Company

Public Service Company of New Hampshire is a public utility company that has issued shares or debt securities to the public. It has no parent company and no subsidiaries that are not wholly owned.

Other entities with publicly-held securities in which Northeast Utilities and/or Public Service Company of New Hampshire have an interest that Rule 29.1 may require to be disclosed are:

Connecticut Yankee Atomic Power Company
Maine Yankee Atomic Power Company
Vermont Yankee Nuclear Power Corporation

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BRIEF OF RESPONDENTS NORTHEAST UTILITIES
SERVICE COMPANY AND PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Public Service Company of New Hampshire ("PSNH") is the largest electric utility company in the state of New Hampshire and provides service to approximately three quarters of that state's population. On January 28, 1988, after several years of increasing economic difficulties, PSNH sought the protection of the bankruptcy court by filing a petition for reorganization pursuant to Chapter 11 of the Bankruptcy Code.

The PSNH filing triggered a period of intensive litigation and negotiation among PSNH, the State of New Hampshire, holders of various interests in and claims against the bankruptcy estate, and a number of parties interested in acquiring PSNH. In November of 1989, the State and respondent Northeast Utilities Service Company ("Northeast") agreed on a rate plan to help resolve the bankruptcy in connection with the proposed acquisition of PSNH by Northeast. A reorganization plan embodying the proposed acquisition won the support of PSNH and the official committees appointed by the bankruptcy court to represent the equity owners and the impaired major creditors of PSNH.¹

Following appropriate hearings, the bankruptcy court confirmed the reorganization plan proposed by Northeast. Petitioners Richards, Kaufman, and Rochman ("RKR"), owners of less than one percent of the common stock in PSNH, participated actively in the confirmation hearings as opponents of the plan. Indeed, as the bankruptcy court noted in its extensive memorandum opinion overruling RKR's objections, Pet. App. 536a-647a, most of the time spent in the confirmation hearings focused on RKR's claims. *Id.* at 539a. RKR appealed the bankruptcy court's confirmation order to the United States District Court for the District of New Hampshire, which affirmed the decision of the bankruptcy court on August 22, 1991.

The Northeast reorganization proposal included as an essential element the agreement with the State which specifies a range within which rates for retail sales of electricity by PSNH will be set for a seven-year period. In order to facilitate implementation of this agreement, the New Hampshire legislature enacted Chapter 362-C of the New Hampshire Revised Statutes Annotated, the statute petitioners seek to challenge in this Court. Proceeding

¹The Northeast plan was ultimately approved by a two-thirds vote of each of the impaired classes except warrant owners, the owners of the most junior interest in PSNH.

pursuant to Chapter 362-C, the New Hampshire Public Utilities Commission devoted twenty-one days of hearing to consideration of the rate agreement. Pet. App. 110a. Northeast and PSNH both urged the New Hampshire Commission to approve the agreement, *id.* 127a, which it did in a Report and Order dated July 20, 1990. *Id.* 73a-447a.

RKR, whose late-filed petition to intervene in the rate agreement proceedings had been denied, Pet. 46, appealed the order approving the rate agreement to the New Hampshire Supreme Court. On appeal, RKR contended that PSNH would have received a greater level of rate relief, and PSNH shareholders would therefore have benefited, if PSNH had sought to litigate its entitlement to higher rates under traditional procedures rather than seeking approval of the rate agreement under Chapter 362-C. Based on that contention, RKR claimed that the Commission's approval of the agreement constituted an unconstitutional taking of the property of PSNH and its shareholders. According to RKR, the fact that PSNH asked the Commission to approve the rate agreement simply demonstrated that RKR should be allowed to assert PSNH's constitutional claim.

The New Hampshire Supreme Court held that the claim asserted by RKR belonged to PSNH, and that RKR did not have standing to assert it. Pet. App. 14a-17a. The New Hampshire Supreme Court also held that RKR could not transform their administrative appeal into a derivative action in which RKR would be allowed to litigate on behalf of PSNH a claim that PSNH's directors had decided not to assert. *Id.* at 15a. Petitioners ask this Court to reverse these state law holdings and to reach their claim that the rate agreement supported by PSNH violates federal constitutional rights of PSNH and, therefore, its shareholders.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioners' Desire To Assert On Behalf Of PSNH And Its Shareholders A Claim That PSNH Has Chosen Not To Assert Presents No Federal Question For Review By This Court

The New Hampshire Supreme Court has determined that petitioner minority shareholders in a New Hampshire corporation have no right to assert on behalf of their corporation a claim that their corporation has chosen not to assert. This holding presents no federal question for review by this Court because, as this Court has repeatedly held, the allocation of the powers of corporate governance, including the right to determine the litigating positions of a corporation, is purely a matter of state law.

As this Court has explained,

“[w]hether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders.” *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263 (1917).

Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 532 (1984). This understanding reflects the

basic principle of corporate governance that the decisions of a corporation – including the decision to initiate litigation – should be made by the board of directors or the majority of shareholders.

Id. at 530. Specification of the circumstances under which this "basic principle of corporate governance" will be set aside "embodies the incorporating State's allocation of governing powers within the corporation...." *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1714 (1991).

State law determines the "allocation of governing powers within the corporation."

As we have said in the past, the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law.... "Corporations are creatures of state law," ... and it is state law which is the font of corporate directors' powers.

Burks v. Lasker, 441 U.S. 471, 478 (1979). Thus, the New Hampshire Supreme Court's determination that petitioner minority shareholders do not have the right to control the litigating position of PSNH in opposition to the judgment of the directors of PSNH² is entirely a decision on a question of state law.³ The New Hampshire Supreme Court's determination of this question of New Hampshire law is binding on this Court, and is not subject to review pursuant to 28 U.S.C. § 1257(a) (West Supp. 1991). Moreover, even if petitioners' claim were within the outer reaches of § 1257(a), this Court does "'not grant certiorari to decide [a question of state law]."

²RKR also seek to override the judgment of the greater than two-thirds majority of voting shareholders who chose to support the reorganization plan and rate agreement. See Pet. 30.

³This conclusion is not changed by the fact that RKR seek to press what they assert to be a federal claim on behalf of PSNH. See *Burks v. Lasker*, *supra*. Moreover, to the extent that petitioners sought in the New Hampshire Supreme Court and seek here to challenge the actions of the Bankruptcy Court, see Pet. 20-45, they are in the wrong forum. See 28 U.S.C. § 158(a) (West Supp. 1991); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958).

Butner v. United States, 440 U.S. 48, 51 (1979)....” *Burks v. Lasker*, *supra*, 441 U.S. at 486.

CONCLUSION

For the reasons stated above, respondents Northeast Utilities Service Company and Public Service Company of New Hampshire request that the petition for a writ of certiorari to the Supreme Court of New Hampshire be denied.

Respectfully submitted,

Respondents, NORTHEAST
UTILITIES SERVICE COMPANY
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RESPONDENT'S BRIEF IN OPPOSITION

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No. 91-200

**IN THE
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COUNTERSTATEMENT OF THE CASE

This Petition is rooted in an ignoble event: the bankruptcy of the largest public utility in New Hampshire — Public Service Company of New Hampshire ("PSNH"). Petitioners Richards, Kaufman and Rochman ("RKR") are three disgruntled shareholders who control less than 0.5 percent of the PSNH stock, including the shares purchased after the PSNH Reorganization Plan was filed with the U.S. Bankruptcy Court for the District of New Hampshire. Through a series of nuisance suits they have attempted to enhance the value of their shares. They are, in the parlance of Wall Street, "bottom fishers". At the New Hampshire Supreme Court RKR sought to have their judgment substituted for that of the other 99.5 percent of PSNH shareholders. The New Hampshire Supreme Court declined to do so and denied RKR standing. Now RKR would have this Court make that substitution.

The PSNH bankruptcy was due to the escalation of the cost of the Seabrook nuclear facility ("Seabrook") from a forecasted cost of \$1.3 billion in 1974 to nearly \$6.5 billion upon completion in 1990. In turn, the interests of ratepayers seeking the lowest possible rates and of shareholders desiring the highest allowable return clashed, first in the U.S. Bankruptcy Court and the New Hampshire Public Utility Commission ("Commission"), then in the New Hampshire Supreme Court and in the United States District Court for the District of New Hampshire.

On July 20, 1990, following seven months of proceedings, the Commission issued its Report and Order No. 19,889 in Docket No. 89-244. Cert. Petition, App. C. It is this order that the Petitioners wish to overturn. Specifically, the Petitioners claim that the Rate Agreement approved by the Commission deprived them of their property by limiting the rates of PSNH. In reality, the Rate Agreement provides the stream of revenue which made possible the reorganization of PSNH.

The determinations set forth in the Order were made pursuant to the authority granted the Commission by the New Hampshire General Court, including New Hampshire Revised Statutes Annotated, Chapter 362-C (Supp. 1990). The statute mandated the Commission to determine whether the acquisition of the bankrupt Public Service Company of New Hampshire by Northeast Utilities ("NU") would be consistent with the public good. Specifically, the Commission was to find whether the proposed Rate Agreement between the State of New Hampshire and NU would be consistent with the public good and whether the rates for electric service as negotiated in the Rate Agreement were just and reasonable. The Commission found that the Rate Agreement met the standards set by the Legislature and approved it on that basis.

The U.S. Bankruptcy Court for the District of New Hampshire confirmed the PSNH Reorganization Plan after a vote by the shareholders and creditors to accept the plan, on April 20, 1990. Pursuant to the Plan, PSNH emerged from bankruptcy on May 16, 1991. On August 21, 1991, the U.S. District Court for the District of New Hampshire affirmed the confirmation.¹

After the PSNH Reorganization Plan was confirmed by the U.S. Bankruptcy Court and approved by the Commission, RKR appealed the Commission order to the New Hampshire

¹ In the memorandum opinion, the Chief Judge found no error in the findings of the Bankruptcy Court on *de novo* review of the same issues of valuation and ratemaking analysis now raised before this Court. Appendix A, Pg. 13a. The District Court noted that "In determining whether a proposed reorganization compromise is 'fair and equitable', a bankruptcy court must assess the 'probabilities of ultimate success should the claim be litigated'... Independent review of the well-crafted opinion (of 54 pages), the 1,686 pages of transcript, and the exhibits, briefs, and other relevant documents satisfies this court that the bankruptcy judge fully complied with the above mandate." Appendix A, Pg. 11a.

Supreme Court. RKR were denied standing. In dismissing RKR for want of standing, the New Hampshire Supreme Court recognized that the Official Committee of Equity Security Holders actively participated in all proceedings before the Bankruptcy Court. On January 3, 1990, the Bankruptcy Court had approved the Third Amended Disclosure Statement, pursuant to 11 U.S.C. § 1125(b), authorizing the proponents to solicit acceptance of the Plan. The specific treatment of PSNH assets that RKR finds so objectionable were detailed in that Disclosure Statement which was distributed to shareholders in January 1990. Thus, the equity holders were aware of the valuation supported by the Rate Agreement before they voted to accept the NU sponsored Reorganization Plan. With the informed vote of the equity holders, PSNH acted in accordance with the directions of its shareholders when it later, actively supported the approval of the Rate Agreement by the Commission. PSNH vigorously acted to maximize the value of its assets in the bankruptcy proceeding in order to protect the interest of its shareholders. It was only after the Equity Committee chose to support the NU sponsored Reorganization Plan that PSNH accepted the NU plan as the maximum value to be realized for the company.

PSNH was a full party to all of the proceedings before the Commission and supported the Rate Agreement that is the subject of RKR's petition here. Cert. Petition, App. E at 468a. As shareholders of PSNH, the rights of RKR are derived from PSNH and may be asserted only through that entity. *Stevens v. Lowder*, 643 F.2d 1078, 1080 (5th Cir. 1981). Consequently, as the courts below found, RKR was without standing to pursue an appeal challenging the result advocated by PSNH with the affirmative support of the equity holders.

Petitioners allege that the Rate Agreement between the State and NU and approved by the equity holders is the basis for the lost value of their investments. The Petitioners are in error. It was the bankruptcy of the public utility that directly

affected the value of their common stock. More accurately, the Reorganization Plan approved by the Bankruptcy Court was the design of the "new" PSNH as it emerged from bankruptcy. The Rate Agreement is a part of that Reorganization Plan which allowed the corporation to emerge from bankruptcy as a viable entity by providing assured rate increases over the next seven years. Both the Commission and the New Hampshire Supreme Court found this to be an appropriate balancing of the interests of both ratepayers and investors.

REASONS FOR DENYING THE WRIT

I. *Petitioners Lack Standing to Challenge the Decisions Below.*

The Petitioners seek to have this Court reverse the holdings of the New Hampshire Supreme Court and the New Hampshire Public Utilities Commission that denied RKR standing to represent all PSNH ratepayers. In filing their Petition for Writ of Certiorari, RKR again ignore that they are barred from challenging the decisions of the Commission and the highest state Court.

A. **RKR are not Proper Petitioners for Certiorari.**

Because Petitioners were not a party to the case below, they have no standing to bring a Petition for Writ of Certiorari to this Court. As a nonparty below, RKR should be denied standing to bring this petition when the real party to the interests claimed by RKR, PSNH, declines to petition this Court. Indeed, PSNH, on behalf of its shareholders, actively sought the decision below. Any interests held by Petitioners were represented below and RKR have not shown their interests to be separate from those of PSNH, nor their injury to be distinct from that suffered by the corporation. *Leach v. FDIC*, 860, F.2d 1266, 1268 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 3186 (1989). Even if this Court were to grant the petition to review

the New Hampshire Supreme Court's denial of standing, RKR cannot petition for review of the other aspects of the judgment below which they have included here in their Petition for Writ of Certiorari. *United Auto Workers v. Scofield*, 382 U.S. 205, 209 (1965), *Cascade Natural Gas Corp. v. El Paso Gas Co.*, 386 U.S. 129 (1967).

B. The New Hampshire Supreme Court Applied the Correct Legal Standard in Denying Petitioners Standing.

Before the New Hampshire Supreme Court, RKR failed to establish personal injury from the Commission order and, instead, sought redress of alleged harm to PSNH. Conveniently, RKR ignored the fact that PSNH, as representative of the shareholders, opposed the RKR appeal to the New Hampshire Supreme Court. Both the Commission and the New Hampshire Supreme Court found that RKR did not represent the interests of PSNH. The Commission found that "since RKR's rights have already been adjudicated by the Bankruptcy Court, RKR have suffered no 'injury in fact' by the Commission's Final Order; since RKR's rights are derivative, RKR are not 'directly affected' by the Commission's proceedings." Cert. Petition, App. E. at 468a. In reviewing this decision, the New Hampshire Supreme Court applied the standards expressed in *State ex rel. Thomson v. State Board of Parole*, 115 N.H. 414, 419, 342 A.2d 634, 637 (1975) (regarding the need to protect the litigation process from improper plaintiffs by applying the law of standing), and in *New Hampshire Bankers' Ass'n v. Nelson*, 113 N.H. 127, 129, 302 A.2d 810, 811 (1973) (holding that a party must show a direct injury to establish standing to appeal an agency decision).

RKR allege a violation of the rights of PSNH as a corporation, and of themselves as individual shareholders as guaranteed by the Fifth and Fourteenth Amendments. However, as individuals they have no standing to represent the corporate body because PSNH was an active party to all stages of the

proceedings. The Court below noted that "...a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected." *Appeal of RKR; Appeal of CRR and Hilberg*, N.H.U, 590 A.2d 586 (1991), *citing* 59 Am.Jur. 2d *Parties* § 33 (1987).

Furthermore, RKR failed to meet the statutory requirements of RSA Chapter 541:6 which obligate the plaintiff to demonstrate that he has suffered an "injury in fact" in order to appeal. *See also, Bankers Association v. Nelson*, 113 NH at 129, 302 A.2d at 811 (1973).

Petitioners failed to establish any injury and, thus, were denied the right to challenge the Commission's order before the New Hampshire Supreme Court. The Petition for Certiorari should be denied for the same reason.

II. *No Substantial Federal Question is Presented for Review.*

A. **The Commission Correctly Applied RSA 378:30 and Due to the Specificity of Its Application to the Facts, the Issue Lacks General Application and Does Not Warrant Review by This Court.**

The Petitioners wish to elevate their disappointment with the PSNH bankruptcy result to a matter of national importance. Their attempt to manufacture a federal question should be rejected.

In examining whether the application of an otherwise valid state statute effects a taking, the Court does not apply a set formula; rather, the Court conducts "ad hoc factual inquiries ... with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Min. & Recl. Ass'n.*, 452 U.S. 264,295 (1981). Thus, the *ad hoc* factual analysis that the Court would apply in plenary review here

would be restricted to the unique factual circumstances confronting PSNH. Such an analysis can have no general applicability.

As set forth in the State's Counterstatement of the Case, the PSNH facts are unique to public utility regulation in New Hampshire and have no implication for utility regulation on a national basis. Because this petition turns on particular factual matters which will not have general or recurring applicability, it should be denied. *See, e.g., Rice v. Sioux City Cemetery*, 349 U.S. 70, 71 (1955) (the issue must be "beyond the academic or the episodic"), *United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts").

B. The New Hampshire Supreme Court Correctly Decided the Question Presented.

The crux of the Petitioners' argument is that "the State took PSNH property without due process of law when it approved the Agreement without regard to whether it will enable PSNH to recover its prudent investment in its used and useful property." Cert. Petition, p. 54. RKR's position is without merit.

The PSNH Reorganization Plan set the value of PSNH assets, not the Rate Agreement. The Rate Agreement financed the company as reorganized, but the shareholders and creditors agreed to a value for PSNH assets in a consensual plan. When presented with the Rate Agreement, the Commission applied the standards set forth in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), to balance the interests of investors and ratepayers. Likewise, the Commission and the New Hampshire Supreme Court looked to *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) for guidance in valuing the assets of a public utility. In that case, the Court held that states are free within broad limits to decide which

rate-setting methodology best meets their needs in balancing the interests of the utility and the public. *Id.* at 316.

Petitioners now ask the Court to make a new rule which will use only "prudent investment" as the measure for rate orders. No doubt, RKR are willing to present a standard which is to their own liking. However, the petitioners have failed to identify how their parochial concerns have national significance and warrant the attention of this Court.

RKR would have this Court establish a standard that prudent investment is the only issue to be determined when considering the reasonableness of the rates. Since recognizing in *Hope* that a "Commission is not bound to the use of any single formula or combination of formulae in determining rates," 320 U.S. at 602, the Court has held that there is no "prudent investment rule" required by the Constitution, but that other approaches in rate-setting might be used. *Wisconsin v. FPC*, 373 U.S. 294, 309 (1963). Indeed, the Court has specifically rejected the adoption of the "prudent investment rule" as a constitutional standard. *Duquesne Light Co. v. Barasch*, 488 U.S. at 315 (1989). In failing to address the end result of the Commission's order, the Petitioners fail to address a critical requirement under the *Hope* standard. Moreover, the burden is not upon this Court nor upon the other parties to dissect the end result, *Hope*, 320 U.S. at 602, and the Petitioners have failed to establish a basis for abandoning this well established standard.

CONCLUSION

For the reasons stated herein, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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APPENDIX A

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE**

In re: Public Service Company of New Hampshire

Martin Rochman;
Edward Kaufman;
Robert Richards,
Appellants

v.

Civil No. 90-272-D

Northeast Utilities Service Group;
Official Committee of Equity
Security Holders of Public
Service Company of New Hampshire,
Appellees

MEMORANDUM OPINION

In this bankruptcy appeal, certain common stock holders of Debtor Public Service Company of New Hampshire ("PSNH") challenge confirmation of the Plan of Reorganization ("Plan").

1. Background

PSNH is the largest electric utility company in New Hampshire. In 1974 it commenced the construction of a two-unit (i.e., two reactors) nuclear power plant in Seabrook, New Hampshire. The projected cost of completion was approximately \$1.3 billion, with a completion date of November 1979 for Unit I.

PSNH was the lead utility with respect to the construction of Seabrook, initially holding fifty percent ownership in the project. On May 7, 1979, the New Hampshire Legislature enacted a statute which prohibited any recovery in electric rates for construction costs of a power plant until such plant was actually producing electric power. New Hampshire Revised Statutes Annotated ("RSA") 378:30-a.¹

The effect of this legislation was to substantially increase the cost of completion of Seabrook. Funds would thereafter have to come from financial institutions at interest, rather

¹ RSA 378:30-a states:

Public Utility rates or charges shall not in any manner be based on the cost of construction work in progress. At no time shall any rates or charges be based upon any costs associated with construction work if said construction work is not completed. All costs of construction work in progress, including, but not limited to, any costs associated with constructing, owning, maintaining or financing construction work in progress, shall not be included in a utility's rate base nor be allowed as an expense for rate making purposes until, and not before, said construction project is actually providing service to consumers.

than from the electric rate payers. Undaunted by such adversity, PSNH and the other joint owners of Seabrook decided to proceed with its construction.

Eventually, Unit I only was completed in October 1986. Other events caused the cost of Seabrook construction (including carrying costs and interest) to escalate to \$6.5 billion as of January 1, 1990. PSNH, whose ownership interest in the interim had been reduced to 35.6 percent, had invested approximately \$2.9 billion in the Seabrook project.

On January 28, 1988, PSNH filed a petition for reorganization pursuant to chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1146. This unusual action on the part of a utility was triggered by the previously described escalating costs of construction at Seabrook.

On November 22, 1989, Northeast Utilities Service Company ("NUSCO")² and the Governor and Attorney General of New Hampshire entered into an agreement ("the Rate Agreement") whereby changes would be made in the method of establishment of electric rates by the New Hampshire Public Utilities Commission ("PUC"). On December 18, 1989, a special session of the New Hampshire Legislature enacted legislation authorizing the PUC "to determine whether the

² NUSCO is a subsidiary of Northeast Utilities ("NU"), a large Connecticut-based electric utility company.

implementation of the [Rate] Agreement would be consistent with the public good." RSA 362-C:3 (Supp. 1990).³

On January 2, 1990, the parties interested in finalization of the bankruptcy proceedings ("the Proponents") filed the Plan together with their Third Amended Disclosure Statements. Bankr. Document No. 2998. On January 3, 1990, the bankruptcy court approved the Disclosure Statement pursuant to 11 U.S.C. § 1125 (b) and authorized the Proponents to solicit acceptance of the Plan by the various classes of creditors and equity security holders.

The court also set April 1990 as the time for the holding of confirmation hearings.

Appellants Martin Rochman, Edward Kaufman, and Robert C. Richards ("RKR") are owners of PSNH common stock. Prior to commencement of the confirmation hearings, RKR filed objections to such confirmation. The thrust of their objections was that the common stock holders of PSNH would likely recover a greater return on their investment if a litigated rate case were held before the PUC.

³ RSA 362-C:3 (Supp. 1990) provides:

The commission is authorized, after hearing, in one or more proceedings to be initiated and completed during the pendency of the Public Service Company of New Hampshire bankruptcy, to determine whether the implementation of the agreement would be consistent with the public good. If the commission so finds, it shall, notwithstanding any other provision of law, establish and place into effect the levels of rates, fares, or charges and the fuel and purchased power adjustment clause to be maintained for Public Service Company of New Hampshire, or its successor, in accordance with, and during the time periods set forth in, the agreement; then the commission shall initiate such other proceedings, hold such other hearings and take such other action as may be necessary to implement the provisions of the agreement.

Six days of confirmation hearings commenced on April 4, 1990. The proponents presented a number of expert witnesses, who testified as to utility operations, accounting methods, and rate-making case procedures. Apart from testimony by Mr. Richards, the appellants chose to rely solely on cross-examination of such witnesses.

On April 20, 1990, the bankruptcy court entered its "Order Confirming Third Amended Plan of Reorganization", Bankr. Document No. 3617, accompanying same with its "General Findings of Fact and Conclusions of Law Re Plan Confirmation Issues", Bankr. Document No. 3618. These documents were followed by the court's "Memorandum Opinion on 'RKR' Objections Re Confirmation of Plan of Reorganization". Bankr. Document No. 3742. The effect of such rulings was the rejection of the claims of RKR. This appeal followed.

2. Discussion

The Plan provides for NUSCO to acquire PSNH for \$2.3 billion. The rate agreement therein calls for annual retail electricity rate increases of 5.5 percent for a period of seven years, commencing January 1, 1990.

The Plan was the result of lengthy, arms-length, and difficult bargaining among various utility companies, PSNH, and the State of New Hampshire. Ironically, only the "give-up" of substantial funds by other classes of creditors provides any funds for distribution to the common stock holders of PSNH.

Appellants' theory is that a more substantial rate increase could result from a contested rate hearing before PUC. Based

on rejection of Generally Accepted Accounting Principles ("GAAP"),⁴ and unaccepted anywhere, this argument also overlooks the dangers of "municipalization".⁵ As a "fall-back", RKR relies on the unlikely possibility of a state takeover of PSNH.⁶

a. The Relevant Evidence

PSNH "wrote down" approximately \$1 billion of its \$2.9 billion investment in Seabrook. T. I-A, 109.⁷ Robert M. Busch, Chief financial expert of NUSCO, testified that this action was appropriate, that other utilities had acted similarly, and

⁴ The Financial Accounting Standards Board ("FASB") adopted FASB Standard 71 to specify the accounting principles to be used by regulatory enterprises such as utilities. Thereunder, an Allowance for Funds Used During Construction ("AFUDC") is capitalized, together with other construction costs, including the costs of debt. PSNH originally operated pursuant to FASB 71 until it was required to "write down" its investment.

Another standard, FASB 92, requires that utilities recover their investments over a period not to exceed ten years. The theories advanced by the appellants would require such recovery to extend for a considerably longer period of time.

⁵ "Municipalization" occurs when a municipality leaves its electric supplier to generate its own or to purchase power from another source. In 1984, the City of Concord and Town of Exeter joined forces and withdrew from the PSNH electrical supply system. The City of Nashua, second largest in New Hampshire, was seriously contemplating municipalization at the commencement of and early into the bankruptcy proceedings.

⁶ On May 11, 1989, the New Hampshire Legislature created the "New Hampshire Energy Authority", designed, if necessary, to take over PSNH. RSA 362-B (Supp. 1990). The funding of this authority was to be met by the issuance of revenue bonds. *Id.* at § 14.

A change in the tax laws renders such revenue bonds taxable. In any event, the Legislature repealed the statute effective January 30, 1991. New Hampshire Laws of 1990, chap. 70:5 I.

⁷ The designation "T." followed by a Roman numeral refers to a volume of the transcript of the confirmation hearings. The Arabic numerals indicate the pages of such transcript volume.

that his company had done so two years previously with respect to its shares of Seabrook. *Id.*, 97-101.

As of the time of such "write-down", the PSNH rate per kilowatt hour ("KW") was 8 cents. T. I-A, III. Recovery of the entire investment would have required an increase of close to 90 percent, or a rate of 15 to 16 cents per KW. *Id.*, 111-14. Such increases would have caused many customers of PSNH to leave the system. Moreover, as concerns the "Bower-Rohr" report,^{*} the witness testified that a one-time rate increase of 31 percent, coupled with inflationary increases thereafter, would not be affordable. *Id.*, 122-23.

Bruce W. Wiggett, comptroller of PSNH, testified as to various analyses prepared by PSNH, commencing in 1984,^m which demonstrated that one-time rate increases necessary to recover the cost of Seabrook would be as high as 130 percent. T. IV, 7-8. PSNH recognized, however, that given the competition, and the regulatory and political environment it worked in, such increase could not be requested. *Id.*, 9.

Another analysis, in 1989, resulted in a suggested increase of 89 percent, which PSNH believed not attainable. T. IV, 12. In August 1987, PSNH did request a 15 percent rate increase from PUC. *Id.*, 12-14. That effort was unsuccessful. *Petition of*

^{*} Prepared by economic consultants located in Hanover, New Hampshire, the Bower-Rohr report is discussed at page 210 of the Disclosure Statement. Bankr. Document No. 2998. Appellants made much of its existence, but did not seek to have any of its authors testify as witnesses. The comptroller of PSNH testified that the realities, competitive and political, would have made the Bower-Rohr suggestion of a one-time 31 percent increase, a course that would not be feasible. T. IV, 118-23.

Public Service Company of New Hampshire, 130 N.H. 265, 539 A.2d 263 (1988), *appeal dismissed*, 488 U.S. 1035 (1989).⁹

It was in light of the foregoing circumstances, stated Wiggett, that PSNH realized it could not comply with recognized utility accounting standards, *supra*, note 4, and it therefore “wrote down” the value of Seabrook to \$1.8 billion. T IV, 17-24. PSNH did not, however, change the Form 1 filed with regulatory agencies, as it sought to preserve value in the event of such future events as a marked rise in oil prices. *Id.*, 24-28. As of his testimony on April 11, 1990, Wiggett believed a further “write down” of \$260 million might be required in the financial statement for the year ending 1989. *Id.*, 29-30.

Andrew B. Herf, a partner in the Accounting & Auditing Group of Arthur Andersen & Company, described in detail the accounting foundation for the “write down”. T. IV, 146-69. His conclusion was that the final reduced value of \$1.8 billion was a ceiling beyond which PSNH could not move. *Id.* at 169.

Herf also testified that the “host of factors” involved in any rate case made it “virtually impossible” to predict the outcome of such case. *Id.* at 190.

A number of witnesses testified with respect to the “auction” of PSNH. Robert M. Spann, senior consultant for Charles River Associates, lecturer in economics at George Washington University, and a specialist in regulatory economics and finance, testified that if the value of PSNH was greater than that offered by NUSCO, some other entity would have made such offer. T. III, 115-23. Spann also testified that if the argument of RKR was adopted, the result would be elec-

⁹ The requested rate increase of 15 percent necessarily involved a challenge to the constitutionality of the “anti-CWIP” law, RSA 378:30-a, *supra*, note 1. PUC accordingly transferred the entire issue to the New Hampshire Supreme Court, which upheld the constitutionality of that statute.

tric rates which were too high to be acceptable to most current customers of PSNH. *Id.*, 72-94.

John F. Curley, managing director of the Merchant Banking Department of Morgan Stanley, was retained to advise NUSCO on the possibility of purchasing PSNH. T. III, 196-97. He testified that the Plan of NUSCO offered the highest value available at the conclusion of the well-publicized auction, which had interested four substantial regional utility companies. *Id.*, 227-30. Intimately involved in the financing of the Plan, Curley was optimistic that such financing would be successful. *Id.* 199-215.

Wilbur J. Ross, Jr., of Rothschild, Inc., has been the financial advisor to parties in interest in many major bankruptcy reorganizations. T. III, 283-84. Retained by the equity Committee in this reorganization, he detailed the difficulties encountered in negotiating the Plan. *Id.*, 284-90. A key factor of Plan success was concessions made by preferred stockholders of \$135 million of pre-petition accrued dividends and \$109 million of post-petition dividends to the common stock holders. *Id.* at 285. Before the Plan was finalized, the Equity Committee seriously considered, but ultimately rejected, both a litigated rate case and a state takeover of PSNH. *Id.*, 285-90.

Peter Fox-Penner, vice president of Charles River Associates, specializes in electric economics and electric utility matters. T. I-A, 160-62. He testified as to "price paths", i.e., the sequence of prices over time, which includes consistency in price/revenue planning to achieve desired revenue results. *Id.*, 166-67. A price in excess of such projections results in a decrease in sales and/or a loss of customers. *Id.*, 168-71. A comparison chart created by this witness showed the difference between pricing under the Plan as contrasted with the theory of RKR. NUSCO Exhibit 8, *Id.*, 174-79. Initially, this demonstrates the prices to be charged under the Plan to exceed the prices paid by 80 percent of New England electricity cus-

tomers. *Id.* While some loss of customers is anticipated, the witness opined that the prices would not be so high as to prompt new attempts at municipalization. *Id.* With the prices suggested by RKR, there would be a much greater loss of customers to municipalization or cogeneration. *Id.*

With respect to the possibility of a “phase-in” of rates, witness Robert Spann testified that this approach might present lower initial rates, but higher rates at a later date. T. III, 168-88. While a phase-in would have both benefits and costs, such method of calculation has never provided a “free lunch”. *Id.* at 188.

Appellant Robert C. Richards was an attorney for Long Island Lighting Company (“LILCO”) from 1971 to 1984. T. V, 41. From 1984 to 1989 he was a member of the Strategic Planning Department and Thereafter the Financial Planning Department at LILCO. *Id.*, 41-42. His understanding of New Hampshire law is that PSNH “has a right to recover its prudent investment in its facilities and, therefore, it must be allowed to recover its investments if at all possible.” *Id.* at 43. If the one-time increase of Bower-Rohr, *supra*, note 8, followed by annual increases for inflation, could not be adopted, then NUSCO Plan rates at 7 years, followed by annual inflationary increases until the plant investment was recovered, would maximize the value of PSNH. *Id.*, 49-52.

Richards felt that the Plan imposes no “real burden” on the ratepayers, although the common stock holders have lost most of their investments. *Id.*, 53.

At least one of the formulas suggested by Richards which would lead to a phase-in over the life of the asset, would be in violation of FASB 92. *Id.*, at 73. Another formula assumes that rates of 16 cents per KW would be feasible. *Id.* at 112, 113.

In sum, Richards felt that the anti-CWIP law, RSA 378:30-A, *supra*, note 1, drove up costs, and equates with a “bet” that Seabrook would not run. *Id.*, 202-05. As the “bet” was won by the investors, they should have the right to recover the full value of their investments. *Id.*, 205-06.

The proposal advanced by the appellants assumes \$2.5 billion of debt, and a 31 percent increase plus 4 percent annual increases thereafter. T. III, 85-87. This amount of debt would be 70 percent of the \$3.6 billion assumed by the proposal, and would result in a debt ratio much higher than any publicly regulated utility, and in fact exceeded by only 4.7 percent of all publicly held companies. *Id.*, 88. The issuance of \$2.5 billion of debt would cause fixed interest charges to be 50 percent higher, and if backed only by Seabrook, the interest charges would be much higher. *Id.*, 89. At such “razor-thin” margin, PSNH, with such happening as an extended outage, would be right back in the bankruptcy court. *Id.*, 90.¹⁰

b. Relevant Law

In determining whether a proposed reorganization compromise is “fair and equitable”, a bankruptcy court must assess the “probabilities of ultimate success should the claim be litigated.” *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). This requires formulation of an independent judgment “of the complexity, expense and likely duration of such litigation,” as well as any “other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.” *Id.*, *See also In the Matter of Boston & Providence R.R. Co.*, 673 F.2d 11, 12 (1st Cir. 1982); *In re Continental Investment Co.*, 637 F.2d 9.

¹⁰ As of August 19, 1991, Seabrook has been in operation for one full year. Some 9 outages have occurred in that period, although none of them have been of major dimension.

11) 1st Cir. 1980). Independent review of the well-crafted opinion (of 54 pages), the 1,686 pages of transcript, and the exhibits, briefs, and other relevant documents satisfies this court that the bankruptcy judge fully complied with the above mandate.

Appellants misplace reliance on what they perceive to be an “etched-in-stone” rate-making analysis grounded on a rate base which includes only property “used and useful” in the generation of electricity in which the utility’s investment was “prudent” at the time made. *Appeal of Conservation Law Foundation*, 127 N.H. 606, 637-38, 507 A.2d 652, 673-74 (1986). Not only may legislators give specific instructions to their utility commissions, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989), but the prudent investment rule is not a constitutional standard *Id.* at 315.

As previously indicated, in the consideration of the complex administrative and judicial proceedings attendant on Seabrook, New Hampshire’s highest court has upheld the constitutionality of the “anti-CWIP” law, RSA 378:30-a, *supra*, note 1. *Petition of Public Service Co. of New Hampshire, supra.*¹¹ And, in events subsequent to the conclusion of the confirmation hearings herein, the New Hampshire Court has upheld the Plan here at issue. *Appeal of Richards, N.H.*, 590 A.2d 586 (1991).¹²

In short, the preponderance of the evidence presented at the confirmation hearing demonstrates that a litigated rate

¹¹ Significantly, the Supreme Court of the United States dismissed the appeal of this ruling some twelve days after it had rendered its decision in *Duquesne Light Co. v. Barasch, supra*.

¹² In *Appeal of Richards*, the PUC, pursuant to the mandate of RSA 362-C (Supp. 1990), *supra*, note 3, had approved the Plan which is at issue in these proceedings. The New Hampshire Court ruled that RKR lacked standing to challenge this finding, and also upheld the ruling of the PUC.

case, with its length, complexity, and cost, would probably not result in a rate award greater than that presented by the Plan. Moreover, the record further demonstrates that the accounting and economic changes advocated by RKR would not likely be adopted.

3. Conclusion

Careful review of the record presented satisfies the court that there was no error in the findings of the bankruptcy judge. *De novo* review of the relevant legal authorities demonstrates that he correctly applied the law.

Accordingly, the appeal herein must be and it is herewith denied. The court finds that there is no merit in any argument or suggestion that further stay pending appeal or interference with the bankruptcy proceedings now be had, and directs the clerk to expeditiously enter judgment affirming the findings of the bankruptcy court in this reorganization.

SO ORDERED.

Shane Devine
Chief Judge
United States District Court

— August 21, 1991.

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No. 91-200

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

ROBERT C. RICHARDS, EDWARD KAUFMAN AND
MARTIN ROCHMAN

Petitioners

- v. -

THE STATE OF NEW HAMPSHIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW HAMPSHIRE

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners Robert Richards, Edward Kaufman and Martin Rochman ("RKR") hereby reply to the brief submitted by Respondents Northeast Utilities Service Company ("NUSCO") and Public Service Company of New Hampshire ("PSNH") and the brief submitted by the State of New Hampshire (the "State").

DISCUSSION

I. THE QUESTION OF WHETHER RKR HAS STANDING IS A FEDERAL QUESTION.

NUSCO claims that RKR's petition does not present a federal question. It claims the question of whether stockholders of a public utility have standing to challenge a state regulatory decision in a state court is purely a matter of state law.

But RKR of course are not asking simply whether stockholders of a public

utility have standing to complain about a rate decision. RKR are asking whether stockholders of a public utility that is in Chapter 11 can complain about a rate decision that they claim confiscates the property of the public utility and destroys the wealth of its stockholders in violation of the U.S. Constitution.

This Court has said that the "first place one must look to determine the powers of corporate directors is in the relevant State's corporation law" but it has also said that that is not the only place one must look and not even the last place. Indeed, it has specifically said that a state rule with regard to corporate governance will not be respected if its application is inconsistent with the federal policy underlying the cause of action. Kamien v. Kemper Financial Services, Inc. 111 S. Ct. 1711, 1718 (1991).

It has also said that "when a federal

statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation . . . are federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted." Burks v. Lasker 441 U.S. 471, 476 (1979).

On the face of it, NUSCO is advancing a rather remarkable proposition. RKR are claiming that the State has violated the Constitution and yet NUSCO would have this Court hold that the State, either by court rule or statute, can finally determine who can complain about that wrong. This Court may in the end agree with the Supreme Court of New Hampshire that RKR does not have standing, but it would be absurd to hold that the question of who can complain about a violation of the Constitution is a state question.

RKR would also submit that the nation has a special interest in protecting

investors in the nation's utilities.

A utility is a special kind of corporation. It is not like other corporations that are created by private individuals for the purpose of doing business for a profit and therefore who arguably agree to abide by the rules of corporate governance established by the state of incorporation. A utility is created pursuant to special statutory by residents of the state to serve the people of the state.

The stockholders are theoretically the owners of the utility and have the power to choose their directors and determine the policy of the corporation but as a practical matter they have no real control over either management or company policy. The stockholders are so numerous it would be impossible as a practical matter for them to replace management no matter how badly it performs. And the

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utility is obliged to serve the public in accordance with the rules and regulations of its regulators no matter how badly it is treated by the state. The stockholders are not viewed by either management or the state so much as owners of the corporation as sources of capital. They are not paid "profits" but a return that is said to reflect the utility's "cost" of capital.

And finally, management generally are residents of the service territory and as such are undoubtedly concerned about the welfare of their fellow residents and the economy of their service territory and perhaps more concerned about them than the welfare of the stockholders, many of whom and in the case of the utility in a small state like New Hampshire, perhaps most of whom, may live in other states.

Since a utility is so dominated by

parochial interests, it would not be a very attractive investment if the state did not assure investors that there investments would be treated fairly. Ever since FPC v. Hope Natural Gas 320 U.S. 591 (1944), the states have generally by statute or commission and court decision given the investors that assurance by promising that the utility will be allowed to recover the original cost of their prudent investments in their facilities. In form, the promise is to the utility but in effect it is to the stockholders because the utility must serve in any event.

Because the states must make that promise in order for the utilities to raise capital from non-residents, RKR submits that the nation has a special interest in making certain that the states keep that promise and that the stockholders should therefore have as a

matter of federal law standing to challenge a rate decision in state court and before this Court, if and when that is necessary, to make sure that management holds the state to its promise.

But of course PSNH is not an ordinary utility. It has filed in Chapter 11 to seek federal protection from its creditors and presumably anyone else that might want to destroy it. Even if this Court believed it was appropriate, in normal circumstances, in the interest perhaps of expediting rate proceedings, to require stockholders to rely on the business judgment of management, it is surely not appropriate once the utility is forced by regulation to seek the protection of the Bankruptcy Court.

Chapter 11 assumes that management's judgement is deficient. It assumes that management has failed to protect the estate and may continue to do so. Ac-

cordingly, it authorizes other parties to participate in the proceedings to try to protect their interests and the value of the estate. It authorizes the creation of official committees to represent the creditors and the stockholders and gives them the right to challenge reorganization plans that are supported by management. It would surely be absurd for this Court to allow a state to deny an official committee the right to challenge the approval by the state commission of a rate agreement contained in a plan of reorganization, but if NUSCO's contention is right, the state would have that power.

The Bankruptcy Code also, however, recognizes that even management and the official committees together can not be fully relied on to protect the interests of all parties. It recognizes that the people on the committees may have real

conflicts of interest with some of the parties they are supposed to represent. It recognizes that collusion between management and the committees is quite possible and, therefore, gives all parties in interest and all individual stockholders the right to participate in the process to try to protect their interests and the value of the estate. And clearly, as this case demonstrates, if individual stockholders of a public utility do not have the right to challenge a rate decision approving a rate agreement embodied in a plan of reorganization, the federal policy reflected in those provisions will be frustrated.

NUSCO, PSNH and the State contend that RKR are really complaining about the confirmation of the Plan because it was confirmation of the Plan and not the approval of the Rate Agreement that determined the value of PSNH and therefore

RKR are in the wrong forum.

RKR are of course challenging the Confirmation Order in the federal courts. They have filed a notice of appeal with the District Court of New Hampshire to the Court of Appeals for the First Circuit and will pursue that appeal. But if RKR can not challenge approval by the PUC of the Rate Agreement at the Supreme Court of New Hampshire and in this Court, their appeal of the Confirmation Order may prove to be futile.

The PUC approval of the Rate Agreement pursuant to RSA 362-C is not conditioned on the confirmation order becoming a final order. RKR in its application for rehearing asked the PUC to so condition its order but it refused. App. E at 478a. RKR believe that if and when the Confirmation Order is reversed, the PUC's approval of the Rate Agreement will become a nullity as a matter of federal

law, but the State will surely disagree. But since the State might be right about that, RKR must be given standing to challenge approval of the Rate Agreement. Otherwise RKR might not have any possible remedy.

And given all that, it can not be seriously suggested that RKR's Petition does not present a substantial federal question.

II. RKR ARE APPROPRIATE PERSONS TO PETITION THE COURT.

The State suggests that this Court should deny the writ because RKR are not appropriate persons to challenge the rate decision even if other stockholders might be. It attempts to prejudice the Court against RKR by calling them "bottom fishers" who are simply trying to enhance the value of their own shares. The characterization is not accurate. RKR

purchased their stock over several years and have lost a substantial amount of money on their investments in PSNH. And RKR are not simply trying to enhance the value of their shares but the value of the estate for the benefit of all stockholders. But even if it were accurate, it would be no justification for denying RKR standing.

The State's contention, of course, is that it should not have to defend its actions against persons who bought stock only after the State had destroyed its value. But the State is not entitled to any such protection. The Bankruptcy Code makes no such distinction. Moreover, if the State were so protected, it would have inflicted even greater damage (the price would have dropped further) and would be even more likely to succeed. And other states in the future might be more likely to emulate the wrong.

Many states, of course, faced problems with nuclear power plants similar to New Hampshire's with Seabrook and considered bankruptcy for their utilities as a solution. But all the others backed away from the brink believing, rightly, that bankruptcy could only lead to higher unavoidable costs for the utility and therefore still higher rates in the long run for the consumer. New Hampshire stuck to its anti-CWIP law and went over. If RKR is not granted standing here, and for that reason can not successfully challenge confirmation of the Plan, the State will have managed to prove that bankruptcy is the way go.

The State also suggests that the Court should deny RKR standing because RKR hold only .5% of the stock and is attempting to substitute its judgement for the other 99.5% of the stockholders, but that assertion is false.

As stated in the Petition, RKR is now being supported financially by about 2000 stockholders holding about 1 million additional shares. And the record before the Bankruptcy Court shows that only about 53% of the common stockholders actually voted on the Plan and less than 40% affirmatively supported it. And surely many of those that voted for the Plan did so only because the Disclosure Statement, among other things, said that the PUC had essentially unfettered discretion to set just and reasonable rates and conveyed the distinct impression that there was no real alternative to the Plan. And surely many of those that opposed the Plan simply threw away their ballots in disgust for the same reasons. The Bankruptcy Court said the Code assumes that persons, who do not vote, do not care, and that may be a fair assumption in most bankruptcies, but

surely a failure to vote in response to the Disclosure Statement issued in this case more likely reflected disgust and rejection than indifference. ¹

¹After the Disclosure Statement was issued, RKR sent a two page letter to 2000 of the largest stockholders urging them to vote against the Plan and accompanied by a questionnaire asking them to tell RKR how they had voted and if they had voted prior to receiving the letter, how they would have voted if they had know of RKR's existence and position on the Plan beforehand. Before RKR could mail the letter, NUSCO obtained a temporary restraining order that delayed the mailing until very late in the voting period. Some stockholders did not in fact receive the letter until after the voting period had expired. About 735 stockholders returned the questionnaire

In sum, there is very good reason to believe that many stockholders in PSNH shared at the time of the vote, and share now, RKR's outrage at what has happened

and the returns indicated that a substantial percentage of stockholders that either voted for the Plan or did not vote at all would have voted against the Plan if they had known of RKR's existence and position beforehand. Indeed, the returns suggested that the stockholders would not have accepted the Plan if RKR had been able to send their letter to all of the stockholders prior to the vote. RKR offered the returns from the questionnaire into evidence during the confirmation hearing to show that despite the vote, the common stockholders were not at all happy with the Plan but the Bankruptcy Court rejected the offer as being irrelevant to any question then before it.

in this case.

III. IN THE INTEREST OF JUSTICE THIS COURT SHOULD NOW DETERMINE WHETHER THE STATE TOOK PSNH'S PROPERTY WITHOUT JUST COMPENSATION.

The State argues that even if the Court chooses to consider the issue of standing it can not properly consider at this time the question of whether the State by approving the rate agreement without regard to whether it enabled PSNH to recover its prudent investment in used and useful property took PSNH property without due process of law.

If the Court grants the writ only with respect to the standing issue and then decides after briefing some months hence that RKR does have standing the matter would have to go back to the court below for a decision on the merits. But since the court below has already said that the Constitution does not require anything in particular (as the State

repeats in its brief), RKR will in all likelihood have to return sometime hence to this Court for a decision on the merits without any advancement whatsoever of the issues that RKR is now presenting.

It is apparent that the State as well as the Supreme Court of New Hampshire need to be told in no uncertain terms what the law is in this area. This Court has made a clear distinction between methods used to set rates and the consequences of those methods, but the State as well as the Supreme Court simply ignore the distinction.

This Court should therefore take this opportunity to state very clearly that although it is not concerned about methods, it is very concerned about consequences and that it is particularly concerned about a "State's decision to arbitrarily switch back and forth between methodologies in a way which required

investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others . . . " Duquesne Light Co. v. Barasch 109 S. Ct. 609, 619 (1989).

It should, therefore, grant the writ so that it can hold in due course that when the State passed and then implemented RSA 362-C, it unacceptably switched methodologies from "prudent investment in used and useful facilities" to "consistent with the public good" and then it should direct the court below to render a decision on RKR's appeal consistent with that holding.

CONCLUSION

For the reasons stated herein and in the Petition, the Court should grant the writ in all respects.

Respectfully submitted,

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